

**THE CHANGING ROLE OF THE MODERN PROSECUTOR: HAS  
THE NOTION OF THE “MINISTER OF JUSTICE” OUTLIVED ITS  
USEFULNESS?**

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DAVID PLATER  
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## STATEMENT

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Date 9 April 2011

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## CHAPTER 1

### THE ROLE OF THE PROSECUTOR AS A MINISTER OF JUSTICE: “THE SILVER THREAD OF THE CRIMINAL LAW” OR A “GLIB PHRASE”?

PART 1: INTRODUCTION: WHY THE PROSECUTORIAL ROLE IS WORTHY OF STUDY .....	1
PART 2: THE CONCEPT AND CONTEXT OF THE “PROSECUTOR” FOR THE PURPOSE OF THIS THESIS .....	9
PART 3: THE PROSECUTOR AS A MINISTER OF JUSTICE: THE “SILVER THREAD OF THE WEB OF THE CRIMINAL LAW” .....	21
PART 4: WHY THE EXERCISE OF THE PROSECUTORIAL ROLE MATTERS.....	24
<i>Part 4(1): The Practical Importance of the Prosecutorial Role.....</i>	<i>24</i>
<i>Part 4(2): Principled Importance: the Rationale of the Minister of Justice Role.....</i>	<i>29</i>
PART 5: OVERVIEW OF THESIS .....	32

## CHAPTER 2

### THE TRANSFORMATION OF THE PROSECUTING LAWYER’S ROLE IN ENGLAND: FROM “PARTISAN ZEALOT” TO “DEMI-GOD” OF MINISTER OF JUSTICE, NOT THE RESULT OF AN “IMMACULATE CONCEPTION”

PART 1: INTRODUCTION .....	36
PART 2: THE PROSECUTOR’S ORIGINAL ROLE: TANTAMOUNT TO THE “WORST SORT” OF MURDERER?.....	38
PART 3: THE ROLE TRANSFORMED: THE PROSECUTOR AS A “DEMI GOD” OF TRUTH AND JUSTICE .....	43
PART 4: THE EMERGENCE OF THE ADVERSARIAL CRIMINAL TRIAL .....	53
PART 5: THE LEGAL SYSTEM OF THE NINETEENTH CENTURY: THE DISADVANTAGED ACCUSED .....	58
PART 6: RESTRICTIONS ON THE RIGHT OF ACCUSED TO LEGAL REPRESENTATION: “WHAT CAN BE A MORE MONSTROUS PERVERSION OF EVERY PRINCIPLE OF JUSTICE?” .....	64
PART 7: PRIVATE PROSECUTORS AND THE LACK OF A PUBLIC LEGALLY QUALIFIED PROSECUTOR: “A SPHERE OF PRIVATE ANIMOSITY, COMPROMISE AND REVENGE?” .....	67
PART 8: THE ENGLISH PROSECUTOR AS A MINISTER OF JUSTICE: LOYAL, IF NOT RELIGIOUS ADHERENCE? ..	74
PART 9: AN OVERLOOKED QUESTION RAISED BY THE EMERGENCE OF THE MINISTER OF JUSTICE ROLE IN THE NEW ADVERSARIAL SYSTEM: IRRECONCILABLE TENSIONS? .....	79
PART 10: OTHER IMPLICATIONS OF THE MINISTER OF JUSTICE ROLE .....	84

## CHAPTER 3

### THE DEVELOPMENT AND APPLICATION IN NINETEENTH CENTURY AUSTRALIA OF THE PROSECUTOR’S ROLE AS A MINISTER OF JUSTICE: RHETORIC OR REALITY?

PART 1: INTRODUCTION .....	86
PART 2: METHODOLOGY .....	89
PART 3: THE EVOLUTION OF THE PROSECUTOR’S ROLE IN NINETEEN CENTURY AUSTRALIA.....	90
PART 4: PROSECUTORIAL RESTRAINT IN 1800S AUSTRALIA: MINISTER OF JUSTICE OR CLASS BIAS?.....	94
PART 5: PROSECUTORIAL ZEAL ON DISPLAY IN AUSTRALIA: THE NEED TO SET AN EXAMPLE IN CONFRONTING AN “ENEMY OF SOCIETY”? .....	101
<i>Part 5(1): Bushrangers.....</i>	<i>101</i>
<i>Part 5(2): Convicts.....</i>	<i>107</i>

<i>Part 5(3): Political Offenders</i> .....	109
<i>Part 5(4): Aborigines</i> .....	113
<i>Part 5(5): Other Offenders “Beyond the Pale”</i> .....	117
PART 6: THE ULTIMATE TRIUMPH IN AUSTRALIA OF THE PROSECUTOR AS A MINISTER OF JUSTICE .....	120
PART 7: WHY THE MINISTER OF JUSTICE ROLE EMERGED IN PRACTICE IN AUSTRALIA AND ITS IMPLICATIONS .....	126

## CHAPTER 4

### THE CONFIRMATION OF THE PROSECUTOR AS A MINISTER OF JUSTICE WITHIN A MODERN ADVERSARIAL SYSTEM: “INDIFFERENT BUREAUCRAT” OR “VENGEFUL ZEALOT”: AN IMPOSSIBLE BALANCING ACT?

PART 1: INTRODUCTION: THE MODERN PROSECUTOR: INDIFFERENT BUREAUCRAT OR VENGEFUL ZEALOT? .....	131
PART 2: THE PROSECUTOR’S POSITION IN AN ADVERSARIAL SYSTEM: TIME TO “FIGHT FIRE WITH FIRE”? .....	133
PART 3: THE ENGLISH AND AUSTRALIAN PROSECUTOR AS A MINISTER OF JUSTICE IN THE MODERN AGE: “POMPOUS TO MODERN EARS”? .....	136
PART 4: THE MINISTER OF JUSTICE IN REAL LIFE: PRACTICAL APPLICATION OF THE “SILVER THREAD” ...	140
PART 5: <i>R v MG AND R v LIVERMORE</i> : A TIMELY REAFFIRMATION OF THE MINISTER OF JUSTICE OR A COUNSEL OF PERFECTION? .....	143
PART 6: THE MODERN PROSECUTOR: IS THE MINISTER OF JUSTICE ROLE STILL APPROPRIATE? TWO IMPORTANT ISSUES .....	151
PART 7: “THE STATE TOO IS ENTITLED TO A FAIR TRIAL”: THE MINISTER OF JUSTICE ROLE QUALIFIED? ..	151
PART 8: “THIS WAS NOT A TEA PARTY”: PRACTICAL APPLICATION OF THE ADVERSARIAL ROLE .....	157
PART 9: THE PROSECUTOR AS BOTH ADVERSARIAL ADVOCATE AND MINISTER OF JUSTICE: IRRECONCILABLE DIFFERENCES?.....	159
PART 10: RATIONALE FOR CHANGE: A “NEW” PROSECUTOR FOR THE 21 <sup>ST</sup> CENTURY?.....	163
PART 11: THE PROSECUTOR’S ROLE: IF NOT MINISTER OF JUSTICE, WHAT? .....	166

## CHAPTER 5

### THE DEVELOPMENT OF THE PROSECUTOR’S ROLE IN ENGLAND AND AUSTRALIA WITH RESPECT TO ITS DUTY OF DISCLOSURE: “NOT A SORT OF TACTICAL TIT FOR TAT OR A GAME OF HAPPY FAMILIES”?

PART 1: THE PROSECUTOR’S GENERAL ROLE: “MINISTER OF INJUSTICE”? .....	175
PART 2: DEVELOPMENTS IN DISCLOSURE 1554 TO 1900: FROM NOTHING TO SOMETHING .....	178
PART 3: <i>R v O’FARRELL</i> , THE DANGERS OF NO DUTY OF DISCLOSURE: “A MISCARRIAGE OF JUSTICE” .....	184
PART 4: DEVELOPMENTS IN DISCLOSURE 1900 – 1981: THE “OLD BOYS ACT” APPROACH .....	186
PART 5: <i>R v WARD</i> , “WHEN PUBLIC CONFIDENCE IN THE BRITISH CRIMINAL JUSTICE SYSTEM REACHED ITS NADIR”.....	193
PART 6: MODERN APPROACH TO DISCLOSURE IN ENGLAND: THE FLOODGATES UNLOCKED OR AN OVERDUE “POLICY OF GLASNOST”? .....	198
PART 7: MODERN DEVELOPMENTS TO DISCLOSURE IN AUSTRALIA: “CATCH UP” TO ENGLAND?.....	209
PART 8: <i>R v MALLARD</i> : CONFIRMATION IN AUSTRALIA OF THE DUTY OF DISCLOSURE.....	216

PART 9: “THE GOLDEN RULE,” THE PROSECUTOR MUST BE A “MINISTER OF JUSTICE” IN DISCLOSURE .....	221
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## CHAPTER 6

### PROBLEMS OF PRINCIPLE AND PRACTICE WITH THE PROSECUTOR’S ROLE AS TO DISCLOSURE, A FAIR BUT WORKABLE MODEL: REALISTIC GOAL OR CHIMERA?

PART 1: INTRODUCTION: THE NEED FOR A DISCLOSURE REGIME TO BE EFFECTIVE BUT FAIR TO ALL .....	227
PART 2: WHO IS THE “PROSECUTION” FOR THE PURPOSE OF DISCLOSURE: “ONE INDIVISIBLE ENTITY”?... 229	
PART 3: CAN THE PROSECUTION BE TRUSTED WITH DISCLOSURE: PUTTING THE FOX IN CHARGE OF THE HEN COOP? .....	232
PART 4: WHO SHOULD DISCLOSE? .....	234
<i>Part 4(1) The Police?</i> .....	234
<i>Part 4 (2): Prosecuting Counsel: Theoretical Considerations</i> .....	236
PART 5: PRACTICAL IMPLICATIONS.....	239
PART 6: TESTS FOR DISCLOSURE: A RECIPE FOR CONFUSION? .....	241
PART 7: KNOWLEDGE OF DEFENCE CASE .....	243
PART 8: DEFENCE INVOLVEMENT: UNAVOIDABLE NECESSITY? .....	248
PART 9: UNDERMINING THE “WAR ON CRIME” AND CREATING A CHARTER FOR ABUSE BY DEFENCE LAWYERS OR DEFENCE LAWYERS DOING THEIR DUTY? .....	252
PART 10: DISCLOSURE OF THIRD PARTY MATERIAL: MINISTER OF JUSTICE OR PRIVATE DETECTIVE FOR THE DEFENCE? .....	256
PART 11: PUBLIC INTEREST IMMUNITY, THE <i>EX PARTE</i> CLAIM: CAN THE PROSECUTOR SERVE TWO MASTERS? .....	262
PART 12: THE LESSONS FROM THE ENGLISH EXPERIENCE OF DISCLOSURE, HOW TO PUT THE GOLDEN RULE INTO PRACTICE: MISSION IMPOSSIBLE? .....	269
PART 13: THE APPLICATION OF THE ENGLISH DISCLOSURE MODEL TO AUSTRALIA: IF IT AIN’T BROKE WHY FIX IT? .....	274

## CHAPTER 7

### THE “LONELY” AND “HEAVY” RESPONSIBILITY OF THE PROSECUTION IN CALLING WITNESSES: MINISTER OF JUSTICE OR ADVERSARIAL ADVOCATE?

PART 1: INTRODUCTION.....	277
PART 2 HISTORICAL DEVELOPMENT: EARLY TENSIONS .....	283
PART 3: THE MINISTER OF JUSTICE ROLE APPLIED: “FOR THE FURTHERANCE OF JUSTICE” .....	288
PART 4: THE ADVERSARIAL ROLE APPLIED: THE MINISTER OF JUSTICE ROLE DISCARDED? .....	293
PART 5: THE MINISTER OF JUSTICE RESTATED: RENEWED INCONSISTENCY.....	300
PART 6: A POSSIBLE SOLUTION TO THE PROBLEM OF WHO CALLS WHAT WITNESS .....	302
PART 7: <i>R v SENEVIRATNE</i> : A RECIPE FOR CONFUSION? .....	303
PART 8: THE ADVERSARIAL ROLE REAFFIRMED? .....	306
PART 9: RENEWED INCONSISTENCY .....	309
PART 10: THE HISTORICAL POSITION IN AUSTRALIA 1824 TO 1955: THE ADVERSARIAL ROLE UNCHALLENGED.....	310

PART 11: HISTORICAL DEVELOPMENT: CALLING WITNESSES AT COMMITTAL.....	313
PART 12: HISTORICAL DEVELOPMENT: CAN ANY CONCLUSIONS BE DRAWN? .....	316

## CHAPTER 8

### THE PROSECUTOR'S MODERN ROLE IN CALLING WITNESSES IN AUSTRALIA: *PRO DOMINA VERITAE*: WELCOME REAFFIRMATION OR UNHELPFUL DISTRACTION?

PART 1 INTRODUCTION: <i>PRO DOMINA VERITAE</i> ? .....	322
PART 2: NO CLEAR POSITION.....	324
CHAPTER 3: <i>R v RICHARDSON</i> AND SUBSEQUENT CASES: REAFFIRMATION OF THE ADVERSARIAL APPROACH: AN OVERLOOKED LINE OF AUTHORITY? .....	329
PART 4: <i>R v WHITEHORN</i> ONWARDS: RETREAT FROM THE ADVERSARIAL APPROACH? .....	336
PART 5: A FERTILE SOURCE OF CHALLENGE: DEFENCE COMPLAINTS AS TO THE PROSECUTION'S CHOICE OF WITNESSES .....	343
PART 6: TAKING THE MINISTER OF JUSTICE APPROACH TOO FAR?.....	348
PART 7: <i>R v DYERS</i> : THE CULMINATION OF THE MINISTER OF JUSTICE APPROACH .....	356
PART 8: <i>DYERS</i> : THE PROSECUTOR'S MINISTER OF JUSTICE ROLE IN CALLING WITNESSES, DOING THE DEFENCE'S WORK? .....	358

## CHAPTER 9

### CALLING WITNESSES IN ENGLAND, THE MODERN APPROACH: MORE CONFUSION OR TOWARDS A FAIR AND WORKABLE SOLUTION?

PART 1: INTRODUCTION .....	362
PART 2: <i>R v OLIVA</i> : A MISGUIDED DIRECTION? .....	364
PART 3: THE MINISTER OF JUSTICE ROLE APPLIED .....	369
PART 4: <i>R v OLIVA</i> AND THE PROSECUTORIAL ROLE AS A MINISTER OF JUSTICE IN CALLING WITNESSES: A RECIPE FOR CONFUSION IN PRACTICE? .....	371
PART 5: CONFUSING THE JURY: A WIDER PROSECUTORIAL DISCRETION? .....	377
PART 6: THE SOLUTION AS TO WHAT TO DO WITH THE MATERIAL BUT UNWANTED WITNESS?.....	381
PART 7: AN OBLIQUE MOTIVE .....	384
PART 8: ATTEMPTS TO ACHIEVE CLARITY AND CONSISTENCY IN THE LAW.....	387
PART 9: THE POSITION IN SUMMARY TRIALS .....	392
PART 10: TOWARDS AN ADVERSARIAL ROLE: DOES <i>OLIVA</i> STILL APPLY?.....	396
PART 11: THE PROSECUTORIAL ROLE IN CALLING WITNESSES IN PRACTICE IN ENGLAND: REAFFIRMATION OF THE ADVERSARIAL ADVOCATE .....	404

## CHAPTER 10

### UNUSED MATERIAL AND CALLING WITNESSES: THE CANADIAN SOLUTION: RECONCILING THE MINISTER OF JUSTICE WITH THE ADVERSARIAL ADVOCATE?

PART 1: INTRODUCTION: THE CANADIAN SOLUTION?.....	410
PART 2: <i>R v COOK</i> , THE PROSECUTOR'S ADVERSARIAL FUNCTION: THE CORRECT SOLUTION?.....	413
PART 3: THE HISTORY OF THE LAW "SETTLED": "ESSENTIAL TO THE NARRATION" EXPLAINED.....	414

PART 4: THE NEED FOR BROAD PROSECUTORIAL DISCRETION “FOR OUR SYSTEM OF CRIMINAL JUSTICE TO FUNCTION WELL” .....	419
PART 5: OBLIQUE MOTIVE OR ABUSE OF PROCESS .....	420
PART 6: TRIAL BY AMBUSH AND THE DUTY OF DISCLOSURE .....	423
PART 7: LOSS OF RIGHT TO CROSS-EXAMINATION.....	426
PART 8: LOSING RIGHT OF LAST REPLY .....	429
PART 9: UNFAIR TO THE ACCUSED TO CALL A WITNESS? .....	430
PART 10: EXPECTING THE DEFENCE TO CALL THE WITNESS: UNDERMINING BASIC PRINCIPLES? .....	434

## CHAPTER 11

### CONCLUSION: TYING THE LOOSE ENDS

PART 1: THE PROSECUTOR’S COMPLEMENTARY ROLES WITH RESPECT TO DISCLOSURE AND CALLING WITNESSES .....	441
PART 2: THE PROSECUTOR’S MODERN ROLE: “TO BECOME A LAWYER FOR THE PEOPLE”? .....	447

## BIBLIOGRAPHY

BOOKS.....	I
ARTICLES.....	XII
REPORTS.....	XXVII
<i>ROYAL COMMISSION REPORTS</i> .....	xxvii
<i>LAW REFORM COMMISSION REPORTS</i> .....	xxvii
<i>OTHER GOVERNMENT REPORTS, REVIEWS &amp; DOCUMENTS</i> .....	xxviii
CASES .....	XXX
LEGISLATION.....	LXXI
<i>AUSTRALIA</i> .....	lxxi
<i>OVERSEAS JURISDICTIONS</i> .....	lxxii
<i>TREATIES</i> .....	lxxiii
OTHER SOURCES.....	LXXIII
<i>CONFERENCE PAPERS / SEMINAR PAPERS</i> .....	lxxiii
<i>INTERNET MATERIALS</i> .....	lxxiv
<i>MISCELLANEOUS</i> .....	lxxvi
<i>NEWSPAPERS / MAGAZINES</i> .....	lxxvi
<i>PROFESSIONAL RULES, GUIDELINES, POLICIES AND PROTOCOLS</i> .....	lxxix
<i>AUSTRALIA</i> .....	lxxix
<i>OVERSEAS JURISDICTIONS</i> .....	lxxx
<i>SPEECHES / LECTURES / ADDRESSES</i> .....	lxxxi



## **Abstract**

The role of the prosecuting lawyer, despite its crucial importance in the administration of criminal justice, has often been both misunderstood and overlooked. The prosecutor acts not as a partisan advocate bent solely on the conviction of the accused but rather as the disinterested minister of justice whose only purpose is to assist the court in arriving at the truth of the matter in dispute and promoting justice. This notion is deeply entrenched in the criminal law. This Thesis considers the development of the prosecutorial role in England and Australia as a minister of justice. It examines specifically the development and application in England and Australia of two important functions performed by the prosecution; first, the prosecution's obligations in the disclosure of relevant material in its possession to the defence and, secondly, the prosecution's discretion in its choice of the witnesses to call at trial. The focus of this Thesis is on the performance of these two functions in the context of the preparation for trial and/or the conduct of a criminal trial on indictment before the higher courts.

This Thesis considers the inherent tension in the exercise of these functions between the dual prosecutorial roles of minister of justice and active advocate in an adversarial criminal justice system. It is argued that this tension is ultimately not capable of reconciliation. This Thesis questions the extent to which the minister of justice concept remains an appropriate model to govern the exercise of the modern prosecutorial role. It is argued that more than rhetoric is necessary to define and govern the modern prosecutorial role adequately. It may be timely to reconsider the minister of justice concept as a universal definition of the modern prosecutorial role. It is accepted that in relation to disclosure of relevant material the prosecution must act as the candid minister of justice. However, it is argued that the prosecuting lawyer should be free with respect to some functions and in some circumstances to assume a robust and "adversarial" role, notably with regard to its choice of the witnesses to call at trial.



# CHAPTER 1

## THE ROLE OF THE PROSECUTOR AS A MINISTER OF JUSTICE: “THE SILVER THREAD OF THE CRIMINAL LAW” OR A “GLIB PHRASE”?

*The role of the prosecuting lawyer, despite its crucial importance in the administration of criminal justice, has often been both misunderstood and overlooked. The prosecutor has typically been cast as the overzealous partisan advocate bent on securing the conviction of the accused at all costs. Though this perception is not entirely unjustified (notably in the United States), such an image is fundamentally flawed. Rather the prosecutor acts as the disinterested “minister of justice” whose sole purpose is to arrive at the truth of the matter in dispute, regardless of the outcome of the case. This notion is so deeply entrenched that it has been described as the “silver thread” of the criminal law. Despite this support, it should not be blindly accepted. It is suggested that it may be timely to reconsider the minister of justice concept as a universal definition of the prosecutorial role. This Chapter considers the implications of the minister of justice role, especially with respect to the prosecutor’s crucial functions of disclosing relevant material to the defence and its choice of witnesses at trial within an adversarial criminal system, and asks whether the minister of justice model should govern all aspects of the prosecutorial role. It is suggested that more than a “glib phrase” may be needed to adequately define the complex role of the modern prosecutor.*

### Part 1: Introduction: Why the Prosecutorial Role is Worthy of Study

“... the prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor ever feel pride or satisfaction in the mere fact of success. Still less should he boast of the percentage of convictions secured over a period. The duty of the prosecutor, as I see it, is to present to the tribunal a precisely formulated case for the Crown against the accused, and to call evidence in support of it. If a defence is raised incompatible with his case he will cross-examine dispassionately and with perfect fairness, the evidence so called, and then address the tribunal in reply, if he has the right, to suggest that his case is proved. It is no rebuff to his prestige if he fails to convince the tribunal of the prisoner’s guilt. His attitude should be so objective that he is, so far as is humanely possible, indifferent to

the result... I consider it the duty of prosecuting counsel to assist the defence in every way.”<sup>1</sup>

[1.1.1] This was the assessment of the role of the prosecuting lawyer that was offered in 1955, by Christmas Humphreys. Though Humphreys was a famous prosecutor,<sup>2</sup> his conception of the prosecutorial role as the lofty “minister of justice” encompasses not only a disdain for the outcome of the case but even extends to a positive obligation to assist the defence in any way possible. This view of the prosecutorial role is far removed from both the historical<sup>3</sup> and the popular<sup>4</sup> perception of that role. Elish Angiolini QC, the Solicitor-General of Scotland, when pondering what might prompt any young lawyer to aspire to be a prosecutor, observed:

Worldwide, the Prosecutor has been both, historically and in fiction, portrayed as a figure of some suspicion and of doubtful merit. There is also little by way of appealing role models for any aspiring Prosecutor to turn to for inspiration from literature and fiction... generally, literature and fiction also fail to deal a kind hand to those of us who follow this career... In short, popular culture has always loved the criminal defence lawyer or attorney. They are the underdog, the plucky defenders of innocent accused. In contrast, Prosecutors have long been depicted as over-zealous, ambitious and hell bent on framing some poor, marginalised client.<sup>5</sup>

[1.1.2] However, this image of the prosecutorial role is flawed. “The role of the Crown Attorney in the criminal justice system is one of the most crucial, yet also one of the most misunderstood.”<sup>6</sup> The graphic advice offered by a senior prosecutor<sup>7</sup> in the United States called Maurice Nadjari to his colleagues that, “Your true purpose is to convict the guilty man who sits at the defence table, and to go for the jugular as viciously and rapidly as possible...You must never forget that your goal is total annihilation,”<sup>8</sup> is wrong. The proper prosecutorial role, despite the popular perception to the contrary, is often stated to be that of the minister of justice as described by Humphreys.<sup>9</sup> Indeed, so deeply

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<sup>1</sup> Humphreys, C, “The Roles and Responsibilities of Prosecuting Counsel” [1955] Crim LR 739 at 748.

<sup>2</sup> Humphreys was a renowned prosecutor and held the prestigious position of senior Treasury counsel at the Central Criminal Court where he prosecuted with considerable effect many of the most famous English criminal trials of the period.

<sup>3</sup> See, for example, *R v Raleigh* (1603) 2 St Tr 1 and *R v College* (1681) 8 St Tr 549 (see further the discussion of these two notorious historical cases in Part 2 of Chapter 2 at [2.2.2]-[2.2.4]). This Thesis will show that in relation to the historical development of the prosecutorial role in both England (see further the discussion in Part 2 of Chapter 2) and especially Australia (see further the discussion in Part 5 of Chapter 3) this negative perception of the prosecutor is far from unjustified.

<sup>4</sup> The popular stereotype of the prosecutorial role apart from the zealous advocate includes that of a bumbling bureaucrat, an American style crusading District Attorney, a cynical self-serving careerist, the lawyer for the police or a victim’s legal representative. See McGoey, C, “The ‘Good’ Criminal Law Barrister: A Crown Perspective,” Second Colloquium on the Legal Profession, Toronto, March 2004, p 4-1, available at: [http://www.lsuc.onca/media/christine\\_mcgoye\\_good\\_criminal\\_lawyer\\_mar0504.pdf](http://www.lsuc.onca/media/christine_mcgoye_good_criminal_lawyer_mar0504.pdf).

<sup>5</sup> Angiolini, A, “Public Prosecutor: Hero or Villain,” Speech delivered at “The Edinburgh Lectures,” 25 January 2005, available at: [http://download.edinburgh.gov.uk/lectures/4\\_SG39s\\_speech.doc](http://download.edinburgh.gov.uk/lectures/4_SG39s_speech.doc).

<sup>6</sup> Brooks, J, “Ethical Obligations of the Crown Attorney – Some Guiding Principles and Thoughts” (2001) 59 Uni NB L Jour 229.

<sup>7</sup> Smith, A, “Can You Be a Good Person and a Good Prosecutor?” (2001) 14 Geo J Legal Ethics 355 at 375.

<sup>8</sup> *Ibid.*

<sup>9</sup> See further the discussion in Part 3 of this Chapter.

entrenched is this notion, that it has been described as the “silver thread” of the criminal law.<sup>10</sup>

[1.1.3] The purpose of this Thesis is to separate rhetoric from reality. It considers the development and application of the prosecutorial role in England and Australia in light of the contrasting notions advanced by Humphreys and Nadjari. It asks whether the minister of justice concept as described by Humphreys remains an appropriate model to govern the discharge of modern prosecutorial duties or whether there is a place for the role of the partisan and zealous advocate. This Thesis considers the historical development of the prosecutorial role in England and Australia as the minister of justice and the wider context in which this concept emerged (which in itself has been a previously overlooked area of study). It examines the development and application in England and Australia of two crucial functions performed by the prosecution. First, it examines the development of the prosecution’s obligations in the disclosure of relevant material in its possession to the defence. Secondly, it examines the discretion accorded to the prosecution in its choice of the witnesses to call as part of the prosecution case at trial. The inherent tension between the contrasting notions of the prosecutorial role as minister of justice and active advocate in an adversarial criminal justice system is explored in detail in the context of these two functions. It is argued that more than rhetoric is necessary to adequately define and govern the modern prosecutorial role. It may be timely to reconsider the minister of justice concept as a universal definition of the modern prosecutorial role.

[1.1.4] There are a number of reasons why such a study of the prosecutorial role is both necessary and timely. The importance of the exercise of the prosecutorial role in the criminal justice system cannot be overstated.<sup>11</sup> As Melilli notes, “The prosecutor has been fairly described ‘as the single most powerful figure in the administration of criminal justice’.”<sup>12</sup> However, the prosecutorial role, despite its undoubted importance in the criminal justice process, has not only been often misunderstood and distrusted,<sup>13</sup> but also eluded academic scrutiny.<sup>14</sup> Green and Zacharias comment that “despite the practical significance of prosecutorial discretion, for a long time the subject received little attention in the academic literature.”<sup>15</sup> Though this was to change in the United States in the 1970s and 1980s,<sup>16</sup> Sanders and Young highlight that the study of prosecution

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<sup>10</sup> *R v Pearson* (1957) 21 WWR (NS) 337 at 348.

<sup>11</sup> See further the discussion in Part 3 of this Chapter.

<sup>12</sup> Melilli, K, “Prosecutorial Discretion in an Adversary System” [1992] *BYU L Rev* 669 at 672.

<sup>13</sup> Margaret Cunneen SC, a New South Wales Crown Prosecutor observed in 2005 in a highly publicised lecture, “I have been a Crown Prosecutor since 1990. The title has had harsh and odious connotations to some people and certainly its role is frequently misunderstood.” Cunneen, M, “Living with the Law,” the Sir Ninian Stephen Lecture, University of Newcastle School of Law, 24 September 2005, available at: <http://www.smh.com.au/news/national/margaret-cunneens-lecture/2005/09/23/1126982234942.html>. See also *US v MacFarlane* (1945) 150 2 F (2d) 593 at 594 and *US v Blueford* (2002) 312 F (3d) 962 at 968. Cunneen’s lecture was to prove controversial, both as to her trenchant views on the modern adversarial criminal system and one particular criminal case. See further the discussion in Part 5 of Chapter 4.

<sup>14</sup> Sanders, A, and Young, R, “The Ethics of Prosecution Lawyers” (2004) 7 *Legal Ethics* 190.

<sup>15</sup> Green, B, and Zacharias, F, “Prosecutorial Neutrality” [2004] *Wis L Rev* 837, n 2.

<sup>16</sup> *Ibid*. See further the references cited in *Ibid* and Krug, P, “Prosecutorial Discretion and its Limits” (2002) 50 *Am Jour Comp Law* 643, n 2.

practices and ethics in England until very recent years has attracted little interest.<sup>17</sup> A similar lack of scholarly scrutiny has existed in Australia. The Australian Law Reform Commission in 1985 remarked that “the process of prosecutions in Australia at both State and Federal level is probably the most secretive, least understood and most poorly documented aspect of the administration of criminal justice.”<sup>18</sup> The Commonwealth Director of Public Prosecutions noted that “as a general comment on the prosecution system applying in Australia at the time, it was perhaps not that wide of the mark.”<sup>19</sup> These observations are of general application. As Potas notes, “The exercise of prosecution discretion is one of the most important but least understood aspects in the administration of criminal justice.”<sup>20</sup> It is therefore timely to consider and compare the development and exercise of the prosecutorial role in Australia and England.

[1.1.5] It is particularly appropriate to consider the development and application of the prosecutorial role with regard to the issues of disclosure by the prosecution of relevant material and its calling of witnesses at trial. The selection of these topics is justified by their practical importance and their demanding and problematic nature. Of all the various manifestations of the prosecutor’s duty to act as a minister of justice, perhaps none is more crucial to the fairness of the trial or the integrity of the criminal justice process than the need to ensure that all material evidence, whether such evidence advances the prosecution case or not, is brought to the attention of the court and/or the accused. This requirement is imposed by two distinct but closely linked prosecutorial duties. First, there is a widely (though, as will be discussed in Chapters 7 to 10, far from universally) supported proposition that the prosecutor must, in deciding what witnesses to call at trial, ensure that any significant witnesses, whether their testimony helps or hinders the prosecution case, are called by the prosecution. Secondly, the prosecution is now required to furnish to the accused not only the evidence upon which the prosecution intends to rely at trial, but also any additional unused material in its possession that may have any bearing on the case. This duty of disclosure<sup>21</sup> is not confined to material helpful

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<sup>17</sup> The authors note that one recent English textbook on professional conduct (Boon, A, and Levin, J, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford, Hart Publishing, 1999) had even wholly overlooked the prosecutorial role, see Sanders and Young, above n 14, 190. On a personal note, having worked for many years as a prosecuting lawyer in both England and Australia, I have also been struck by the widespread public misunderstanding and the relative lack of study in both jurisdictions about the prosecutorial role.

<sup>18</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders (Report No 15)* (Canberra, ALRC, 1985) p 61.

<sup>19</sup> Rozenes, M, “Prosecutorial Discretion in Australia Today,” Speech delivered at the Australian Institute of Criminology Conference, Melbourne, 18-19 April 1996, p 2, available at: <http://www.aic.gov.au/events/aic%20upcoming%20events/1996/-/media/conferences/prosecuting/rozenes.ashx>.

<sup>20</sup> Potas, I, “Introduction” in Potas, I (ed), in *Prosecutorial Discretion (Seminar Proceedings No 6)* (Canberra, Australian institute of Criminology 1985) p. 2. See also Lievore, D, *Prosecutorial Discretion in Adult Sexual Assault Cases: an Australian Study* (Canberra, Australian Institute of Criminology, 2004), p 1.

<sup>21</sup> The term “disclosure” will be employed in this Thesis in preference to the term “discovery.” The terms are often used in different contexts. In this Thesis “disclosure” is used to denote the positive duty of the Crown to act of its own volition without any pressure or request from the accused to make available to the defence the evidence which it is proposing to adduce at trial and any other relevant material which might tend to establish a defendant’s guilt or innocence. The development and extent of this duty will be considered in Chapter 5 and 6. “Discovery” is used in this Thesis in a similar context to its use in civil litigation. In criminal procedure it refers to less an obligation on the Crown and more of a right of the accused to demand access prior to trial to the evidence and the relevant material pertaining to the case in its possession. See also Shapray, H, “The Prosecutor as a Minister of Justice: a Critical Appraisal” (1969) 15 McGill L Jour 124 at 135.

to the prosecution case but extends to any material that assists the defence case or undermines the prosecution case. This Thesis will focus on these two duties as vehicles to consider whether the prosecutorial role should be that of the minister of justice acting only to promote justice or that of an active advocate in an adversarial process with a legitimate interest in seeking the conviction of the accused.

[1.1.6] The importance to the course and outcome of a criminal trial of the manner in which the prosecution discharges these two functions cannot be overestimated. The prosecutor’s choice of the witnesses to call at trial is a core function of the prosecution that can have a vital bearing on the course and outcome of the trial. The unfairness to an accused if a material witness is not called at trial, whether by the prosecution or the defence, who can either testify in support of the innocence of the accused or who in some way undermines the prosecution case is obvious. Similarly, it is difficult to conceive how any trial can be regarded as fair if the accused is effectively “ambushed” and is not provided with significant material in the prosecution’s possession that supports the defence case or undermines the prosecution case.<sup>22</sup> The importance of frank disclosure by the prosecution of relevant material to the defence cannot be exaggerated. As one barrister observes, “Proper and timely disclosure is the lynchpin of our criminal justice process... It is the foundation of a fair trial.”<sup>23</sup> However, the performance of this duty has proved problematic in practice. The editors of *Archbold* noted in 2006 that this “is an area of law which has developed rapidly in recent years. It is also notoriously difficult.”<sup>24</sup> A former South Australian Director of Public Prosecutions observed, “There is no more contentious an area for a prosecutor than disclosure.”<sup>25</sup>

[1.1.7] Disclosure is likely to continue to prove to be one of the most demanding duties for prosecution lawyers. The former Commonwealth Director of Public Prosecutions observed in 2007:

The continuing obligation to disclose relevant material in the possession of the Crown (investigators/prosecutors) is one of the most contentious areas of work of prosecutors today. I say contentious because of the potential for tensions between prosecutors, the police, the defence, the accused and the Courts that this developing obligation causes...I see this as one of the truly testing areas in the evolution in the role of prosecutors in the 21<sup>st</sup> century.<sup>26</sup>

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<sup>22</sup> See, for example, *R v Ward* [1993] 1 WLR 619 at 645, 674 and 692. See further the discussion in this context of *Ward* in Part 5 of Chapter 5. See further generally Part 9 of Chapter 5.

<sup>23</sup> Moynihan, M, *Review of the Civil and Criminal Justice System in Queensland* (Brisbane, Queensland Government, 2008) p 85. See also for example, *R v Stinchcombe* (1991) 68 CCC (3d) 1; *R v Winston Brown* [1994] 1 WLR 1599 at 1606; and *R v Mallard* (2005) 224 CLR 125 at 151 and 155 per Kirby J. See further Chapter 5, especially the discussion in Part 9 of Chapter 5 at [5.9.1].

<sup>24</sup> Richardson, J (ed), *Archbold: Criminal Pleading and Practice* (2006 ed) (London, Sweet and Maxwell, 2006) p 460 at [4.273].

<sup>25</sup> Rolfe, P, “Disclosure by Both Sides,” Paper presented at the Australian Institute of Criminology Conference, Melbourne, 11 April 1996, p 1, available at: <http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~media/conferences/prosecuting/rofe.ashx>.

<sup>26</sup> Bugg, D, “The Independence of the Prosecutor and the Rule of Law,” Speech at the “Rule of Law: the Challenge of a Changing World” conference, Brisbane, 31 August 2007, available at: [http://www.cdpp.gov.au/Director/Speeches/2007\\_0831db.aspx](http://www.cdpp.gov.au/Director/Speeches/2007_0831db.aspx).

[1.1.8] This Thesis will focus on the development and application of the prosecutorial role, especially in relation to its crucial roles of disclosure of the prosecution case and its choice of witnesses to call at trial, in the context of the preparation for trial or the conduct of the trial at the higher courts as opposed to the context of summary criminal proceedings. Though the Magistrates’ Courts are of “central importance”<sup>27</sup> to the administration of criminal justice, the focus of this Thesis is on the higher courts.<sup>28</sup>

[1.1.9] The minister of justice concept gives rise to the fundamental question of how this role is to be performed in the context of the adversarial criminal justice process that is employed in England and Australia<sup>29</sup> and is “a foundational feature of our legal system”.<sup>30</sup> This system is based on the belief “that it is the open conflict between two opponents of equal force, the defence and the prosecution, that best leads to the ascertainment of truth and the rendering of justice.”<sup>31</sup> The premise of the adversarial system is “that through argument and counter argument, examination and cross-examination” the truth will emerge before an impartial court.<sup>32</sup> Whilst the substance of this premise is often doubted,<sup>33</sup> it is clear that the defining feature of the adversarial system is, and will

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<sup>27</sup> *R v Hereford Magistrates Court, ex parte Rowlands* [1998] QB 110 at 117. See also Sanders, A, and Young, R, *Criminal Justice* (2<sup>nd</sup> ed) (London, Butterworths, 2002) p 485 and Darbyshire P, “An Essay on the Importance and Neglect of the Magistracy” [1997] Crim LR 627. The accuracy of this description is clear. The bulk of criminal offences are dealt with in the summary courts as opposed to the higher courts. See below at [1.2.2].

<sup>28</sup> See further the discussion in Part 2 of this Chapter below for the reasons for this.

<sup>29</sup> For an overview of the development of the adversarial system see Part 4 of Chapter 2. See further the discussions in Part 9 of Chapter 2 and Chapter 4 for the implications of the adversarial system to the performance of the prosecutorial role.

<sup>30</sup> Goodpaster, G, “On the Theory of American Adversary Criminal Trial” (1987) 78 Jour Crim Law & Criminology 118.

<sup>31</sup> Grosman, B, “The Role of the Prosecutor: New Adaptations in the Adversarial Concept of Criminal Justice” (1968) 11 Can Bar Jour 580. See also *Herring v New York* (1975) 422 US 853 at 862, the “very premise of our adversarial system...is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”

<sup>32</sup> Shapray, above n 21, 126. See also Grosman, above n 31, 580.

<sup>33</sup> Though the adversarial system is not without its defenders, notably in its ascertainment of the truth (see, for example, Luban, D, “The Adversary System Excuse” in Luban, D (ed), *The Good Lawyers: Lawyers’ Roles and Lawyers’ Ethics* (Totowa, Rowman and Allanheld, 1984) p 83 at 92 and Walpin, G, “Truth, the Jury and the Adversarial System, America’s Adversarial and Jury System: more likely to do Justice” (2003) 26 Har LJ Pub Pol’y 175), it is often argued that the adversarial system actually operates in practice to defeat the development of the truth, see Frankel, M, “The Search for Truth: an Umpireal View” (1975) 123 U Penn L Rev 1031-1059; Damaska, M, “Presentation of Evidence and Fact Finding Precision” (1975) 123 Uni Penn L Rev 1083 at 1093-1095 and Gerber, R, “Victory versus Truth: the Adversary System and its Ethics” [1987] Ariz S L Jour 3. Moisisdis, for example, asserts that the adversarial system is distracted by the pursuit of “proof” to the detriment of determining the “truth”, see Moisisdis, C, *Criminal Discovery: From Truth to Proof and Back Again* (Sydney, Sydney Institute of Criminology, 2008), 239. It is beyond the scope of this Thesis to enter the longstanding debate as to the success of the adversarial system in arriving at the truth and, in particular, whether an inquisitorial system would be better suited in this respect. It is, as the Australian Law Reform Commission notes, a “moot point” as to which system offers the best means of ascertaining the “truth”, see Australian Law Reform Commission, *Review of the Federal Civil Justice System (Discussion Paper No 62)* (Canberra, ALRC, 1999) p 30, n 119. Indeed, this argument is “incapable of being resolved,” see Eggleston, R, “What is Wrong with the Adversary System?” (1975) 49 Aust LJ 428 at 433. The “wholesale adoption” of an inquisitorial system in either Australia or England is not only impractical but would not necessarily address many of the criticism that have been expressed of the adversarial system, see Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System of Western Australia: Final Report* (Perth, LRCWA, 1999) p 71. Damaska, in



continue to remain so for the foreseeable future,<sup>34</sup> the concept of “legal combat”<sup>35</sup> or the “gladiator model of lawyering”.<sup>36</sup> As Bankowski and Mungham comment, “The [adversarial] system rests upon an assumption of genuine conflict between the parties.”<sup>37</sup> The lawyers on both sides will do their best to advance their case and undermine their opponent’s case.<sup>38</sup> Whilst it is not doubted that the defence lawyer is expected to take an active and adversarial role in the proceedings, the prosecutor, if acting as the restrained minister of justice, must assume a lesser role that is in defiance of the general duty of all other lawyers to act fearlessly on behalf of their clients and promote by all lawful means the interests of their client.<sup>39</sup>

[1.1.10] This leaves unanswered the question of how prosecution counsel is able to perform simultaneously the apparently conflicting roles of one part adversarial advocate and one part minister of justice.<sup>40</sup> “It is well recognised by the Courts,” as MacNair notes, “that a healthy tension must exist between the Crown prosecutor as fearless advocate and seeker of truth.”<sup>41</sup> Whether this tension is capable of reconciliation is questionable.<sup>42</sup> Though the prosecutorial role as a minister of justice is qualified to the extent that it is permissible for the prosecutor to act as an active advocate within an adversarial criminal

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particular, argues that whilst the inquisitorial system is more directed in theory to the ascertainment of the truth than the adversarial system, it is unclear whether the inquisitorial system in practice is actually more successful in this respect, see Damaska, M, “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure” (1973) 121 *Uni Penn L Rev* 506 at 583-593.

<sup>34</sup> This Thesis proceeds upon the assumption that, for all its criticisms (see above n 33) and recent changes in areas such as the growth of “case management” (see Chapter 4, n 19 and the discussion in Chapter 9 at [9.11.4-[9.11.5]) and the advent of “therapeutic justice” and specialised “problem solving” courts (see further below n 90), for the foreseeable future the criminal justice system in both England and Australia will continue to be essentially governed by an adversarial model. The adoption of an inquisitorial system would be, as Sir Anthony Mason noted in 1999, “an extraordinary act of faith” and “would be contrary to our traditions and culture, it would generate massive opposition, and it would call for expertise that we do not presently possess and at the end of the day we would have a new system without a demonstrated certainty that it would be superior to our own” (Mason, A, quoted by ALRC, above, n 33, 31). See also the discussion in Chapter 4, n 21.

<sup>35</sup> Menkel-Meadow, C, “The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering” (1999) 72 *Temp L Rev* 785 at 788.

<sup>36</sup> *Ibid*, 791.

<sup>37</sup> Bankowski, Z, and Mungham, G, *Images of Law* (London, Routledge, and Kagan Paul Ltd, 1976) p 102, n 135. See also Moynihan, above n 23, 89.

<sup>38</sup> Menkel-Meadow, above, n 35, 788. See further the discussion in Part 3 below at [1.3.3].

<sup>39</sup> See below n 171.

<sup>40</sup> See, for example, Shapray, above n 21, 127-128 and Smith, above n 7, 388-389. See further the discussion in Part 9 of Chapter 4.

<sup>41</sup> MacNair, D, “Crown Prosecutors and Conflict of Interest: a Canadian Perspective” (2002) 7 *Can Crim L Rev* 257 at 287.

<sup>42</sup> See, for example, Joy, P, “The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System” [2006] *Wis L Rev* 339 at 416; King J, “Prosecutorial Misconduct: the Limitations upon the Prosecutor’s Role as an Advocate” (1980) 14 *Suff Uni L Rev* 1095; Medwed, D, “The Prosecutor as a Minister of Justice: Preaching to the Converted from the Post-Conviction Pulpit” (2009) 84 *Wash L Rev* 35 at 44; Melilli, above n 12, 698 and Singer, R, “Forensic Misconduct by Federal Prosecutors – and How It Grew” (1968) 20 *Alabama L Rev* 227 at 227-229. See further the discussion in Chapter 4, particularly Part 9, as to whether this tension can be reconciled.

process,<sup>43</sup> the minister of justice role remains always paramount.<sup>44</sup> It remains a difficult, if not impossible, balancing act to perform the dual roles of minister of justice and adversarial advocate.<sup>45</sup>

[1.1.11] The prosecutorial functions of disclosing relevant evidence and calling witnesses highlight the tensions in the dual prosecutorial roles. Jones notes that when the prosecutor is faced with the disclosure of material in a criminal case, the dual roles “naturally conflict” and the prosecutor as a minister of justice “must abandon his adversarial interests and uncharacteristically assist the opponent by disclosing favourable evidence.”<sup>46</sup> The adversarial dimension of the prosecutor’s function places even the ethical prosecutor, acting as a minister of justice, in a position where there is likely to be temptation for him or her to focus on the facts pointing to the defendant’s guilt and to minimise (or even dismiss)<sup>47</sup> any factors which may point to the defendant’s innocence.<sup>48</sup> Similar considerations may arise in relation to the prosecution’s choice of witnesses to call at trial. The natural inclination of the prosecutor in an adversarial process may well be to call only those witnesses or present that evidence that will bolster his or her case in demonstrating the guilt of the accused.<sup>49</sup>

[1.1.12] The formulation of the prosecutorial role as a minister of justice does not establish or define how, within an adversarial system of criminal justice, these often demanding and conflicting duties are to be discharged in practice.<sup>50</sup> The minister of justice term has been criticised as “nebulous”<sup>51</sup> and as offering no more than “general platitudes.”<sup>52</sup> As Medwed observes, “The reliance on ‘justice’ as a governing principle of prosecutorial behaviour is problematic because of the term’s inherent vagueness.”<sup>53</sup> He notes that scholars in the area of prosecutorial ethics “have, not surprisingly, articulated

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<sup>43</sup> See, for example, *R v Savion* (1980) 52 CCC (2d) 276 at 289 and *R v Karaibrahimovic* (2002) 164 CCC (3d) 431 at 450. See further the discussion in Part 7 of Chapter 4.

<sup>44</sup> *R v McCullough* [1982] Tas R 43 at 57. See further the discussion in Part 9 of Chapter 4 at [4.9.1]-[4.9.2].

<sup>45</sup> Dennis, A, “Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power” (2008) 57 Duke LJ 131 at 139. See also Hoeffel, J, “Prosecutorial Discretion at the Core: the Good Prosecutor meets *Brady*” (2005) 109 Penn St L Rev 1133 at 1140-1141 and Melilli, above n 12, 685-704. See further the discussion in Part 9 of Chapter 4.

<sup>46</sup> Jones, S, “The Prosecutor’s Constitutional Duty to Disclose Exculpatory Evidence” (1995) 25 U Mem L Rev 735 at 778. See also *Ibid*, 738-739 and 778-779. See further the discussion in Parts 3 and 4 of Chapter 6.

<sup>47</sup> In an extreme case this can even extend to the prosecution advocate concealing material that undermines the prosecution case or supports the defence case, see Hoeffel, above n 45, 1135 and 1148. This has proved a particular and consistent problem in the United States, see further Chapter 5, n 18 and Chapter 6, n 43.

<sup>48</sup> Burke, A, “Revisiting Prosecution Disclosure” (2009) 84 Ind L Jour 481 at 488-489; Dennis, above n 45, 495-498. See further the discussion in Parts 3 and 4 of Chapter 6.

<sup>49</sup> See further the discussion in Part 1 of Chapter 7.

<sup>50</sup> See, for example, Gersham, B, “The New Prosecutors” (1992) 53 Uni Pitt L Rev 393 at 445; Green and Zacharias, above n 15, 868; Joy, above 42, 410-411 and Cassidy, M, “Character and Context: What Virtue Theory can Teach us about a Prosecutor’s Ethical Duty to ‘Seek Justice’” (2006) 82 Notre Dame L Rev 635 at 637. See further the discussion in Part 11 of Chapter 4 at [4.11.1].

<sup>51</sup> Hoeffel, above n 45, 1137.

<sup>52</sup> MacNair, above, n 41, 258.

<sup>53</sup> Medwed, above n 42, 43.

an array of responses to this state of affairs, most of which are highly critical of the broad, often hortatory nature of the canons of prosecutorial ethics.”<sup>54</sup> Rhetoric alone cannot define the exercise of the prosecutorial role. As Ashworth and Blake observe:

... the precise functions [of prosecution and defence lawyers] are themselves open to dispute. It is one thing to state the defence lawyer’s function is to take all lawful points in order to defend the client, whereas the prosecutor’s function is to see that justice is done and not to strive for a conviction as such. *It is quite another thing to define the boundaries of these functions...and at that stage we need more than glib phrases* [my emphasis].<sup>55</sup>

[1.1.13] To define the role of the modern prosecution lawyer as simply that of a minister of justice without any effort at further refinement or consideration risks falling into the trap identified by Ashworth and Blake of resorting to “glib phrases” as a substitute for achieving a practical and appropriate definition. Though the notion of the prosecutorial role as a minister of justice commands extensive support, there are many scholars who question the concept as a universal definition of the prosecutorial role.<sup>56</sup> While such views are often overshadowed by support for the minister of justice role as the “silver thread” of the criminal law, I would suggest that they raise valid issues for reflection and scrutiny. There is a need for more than “general platitudes” or “glib phrases” to define the prosecutorial role.

[1.1.14] It will be my argument that it is timely to reevaluate the minister of justice concept and ask whether such a role is desirable, or even capable, of universal application. It is accepted that the minister of justice role is applicable with regards to pre-trial disclosure by the prosecution of relevant material and in some other circumstances, such as dealing with a legally unrepresented accused at trial or in the prosecution of cases giving rise to strong emotions, such as alleged child sexual abuse. It is suggested that in such circumstances as the prosecution’s choice of witnesses or in the conduct of the trial when the accused is legally represented, the prosecutor should be able to assume a robust and vigorous role in the proceedings and should be free, as Farrell suggests, to “put on the hat of the zealous advocate for justice.”<sup>57</sup> One must not forget that “the State too is entitled to a fair trial.”<sup>58</sup>

## **Part 2: The Concept and Context of the “Prosecutor” for the Purpose of this Thesis**

[1.2.1] The focus of this Thesis is upon the role of the prosecuting lawyer (whether directly employed by the Director of Public Prosecution or not) in the higher courts, even though it is acknowledged that in practice, despite the common misapprehension to the

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<sup>54</sup> *Ibid.*

<sup>55</sup> Ashworth, A, and Blake, M, “Some Ethical Issues in Prosecuting and Defending Criminal Cases” [1998] Crim LR 16 at 31.

<sup>56</sup> See, for example, Shapray, above n 21, 126-128 and Farrell, R, “Advocacy, Justice and Prosecutorial Misconduct: the Death of the Prosecutor’s Reasonable Inference on Credibility Issues” (2002) 41 Washburn L Jour 299 at 299-302, 304-306 and 323. See further the discussion in Parts 6 of Chapter 4 at [4.6.1]-[4.6.2] and Part 2 of Chapter 11.

<sup>57</sup> Farrell, above n 56, 300.

<sup>58</sup> *R v Karabrahimovic* (2002) 164 CCC (3d) 431 at 449.

contrary,<sup>59</sup> most prosecutions for criminal offences occur in the lower courts and are not conducted by “Crown Prosecutors”. Though the popular image of a criminal trial in England or Australia as that of a trial before a jury at the higher courts “complete with wigs, gowns, a red judge and Rumpole in defence”<sup>60</sup> may suggest that the typical “prosecutor” is a legally qualified bewigged barrister confronting defence counsel, such a perception is misleading.<sup>61</sup> The term “prosecutor” is capable of different connotations. It extends beyond the prosecuting lawyer at the higher courts to others such as prosecuting lawyers (whether barristers or solicitors) in the Magistrates’ Courts,<sup>62</sup> the private prosecutor (so important in historical prosecutions),<sup>63</sup> the police prosecutor (whether legally qualified or not) in the Magistrates’ Courts<sup>64</sup> and officers from any one of a range of agencies with law enforcement responsibilities appearing in the summary courts to prosecute in respect of various specialist areas.<sup>65</sup>

[1.2.2] The importance of the summary courts in the administration of criminal justice has been often overlooked<sup>66</sup> but, as Lord Bingham has explained, “[it] is well known, the Magistrates’ Courts are the work-horses of the criminal justice system in England and

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<sup>59</sup> See Darbyshire, P, “The Lamp that shows that Freedom lives – is it worth the Candle?” [1991] Crim LR 740 at 746 and Hunter, J, and Cronin, K, *Evidence, Advocacy and Ethical Practice* (Sydney, Butterworths, 1995), p 98.

<sup>60</sup> See Darbyshire, above n 59, 746.

<sup>61</sup> See Hunter and Cronin, above n 59, 97-98 and Darbyshire, above n 27, 627-628. This perception overlooks the fact that both the bulk of criminal cases are dealt with in the Magistrates’ Court (see Darbyshire, above n 59, 746-747; see also above n 27 and below at [1.2.2]) and the bulk of legal work in the criminal process is typically performed outside court (see Chapter 4, n 287).

<sup>62</sup> Humphreys, above n 1, 739. See further the discussion below at [1.2.3]-[1.2.4].

<sup>63</sup> See the discussion in Chapter 2 at [2.7.1].

<sup>64</sup> For an overview of the differing models used in Australian and English summary prosecutions, see Corns, C, “Police Summary Prosecutions: the Past, Present and Future,” Paper presented at the History of Crime, Policies and Punishment Conference, Australian Institute of Criminology, Canberra, 9-10 December 1999, available at: <http://www.aic.gov.au/events/aic%20upcoming%20events/1999/~media/conferences/hcpp/corns/ashx>, p 1 and 8-21; Corns, C, “Police Summary Prosecutions in Australia and New Zealand: Some Comparisons” (2000) 19 U Tas L Rev 280 at 280-281 and 295-301 and Krone, T, “Police and Prosecution,” Paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, Australian Institute of Criminology, 22-23 March 1999, available at: <http://www.aic.gov.au/events/aic%20upcoming%20events/1999/~media/conferences/outlook99/krone.ashx>, p 8-11. See further below at [1.2.3]-[1.2.4].

<sup>65</sup> These prosecutions in England include breach of probation and community service orders brought by the Probation Service, false benefit claims brought by the Department of Social Security, breach of food and health standards brought by local authorities, pollution offences brought by the Environment Agency, workplace safety breaches brought by the Health and Safety Executive and the peculiar English offence of television licence evasion brought by the Television Licensing Authority, see Sprack, J, *Emmins on Criminal Procedure* (9<sup>th</sup> ed) (Oxford, Oxford University Press, 2002) p 62 and Sanders and Young, above n 27, 364-365. See generally *Ibid*, 364-380; Johnstone, R, *Occupational Health and Safety, Courts and Crime: the Legal Construction of Health and Safety Offences in Victoria* (Sydney, Federation Press, 2003); Lidstone, K, *et al* (eds), *Prosecutions by Private Individuals and Non-Police Agencies* (Royal Commission on Criminal Procedure (Research Study No 10)) (London, HMSO, 1980) and Slapper, G, *Organisational Prosecutions* (Aldershot, Ashgate, 2001). The situation is similar in Australia where, as Corns notes, breach of community based orders such as probation or parole and the plethora of modern regulatory offences are summarily prosecuted by staff from the relevant Government agency, see Corns (1999), above n 64, 1, n 1.

<sup>66</sup> See Darbyshire, above n 27, 627-643 and Vennard, J, *Contested Trials in Magistrates’ Courts* (Home Office Research Study No 71) (London, HMSO, 1982) p 1.

Wales. They handle the vast majority of criminal cases, and for most citizens they represent the face of criminal justice.”<sup>67</sup> The bulk of criminal offences are dealt with in the summary courts as opposed to the higher courts.<sup>68</sup> Figures consistently show that over 95% of all criminal cases in both England<sup>69</sup> and Australia<sup>70</sup> are dealt with summarily.

[1.2.3] There are major differences between England and Australia (and further within Australia) as to the arrangements governing prosecutions in the Magistrates’ Courts. In England since 1985 the Crown Prosecution Service (“the CPS”), an independent statutory agency headed by the Director of Public Prosecutors, has been solely responsible for the conduct of summary prosecutions in respect of cases brought by the police,<sup>71</sup> though not in respect of the “substantial number”<sup>72</sup> of other prosecutions, typically of a “regulatory” nature,<sup>73</sup> that are brought by a wide range of other local and central government agencies.<sup>74</sup> Such cases are presented by the staff of the alternative prosecuting agencies whose practices vary considerably between them. <sup>75</sup> Padfield in 2008 also highlighted “the extraordinarily different prosecution policies of [the] different bodies...[and that] there are some very interesting differences between the different bodies as to whether they seek to prosecute or negotiate satisfactory results.”<sup>76</sup>

[1.2.4] The police no longer act as prosecutors in the English Magistrates’ Courts. A similar situation exists in the Australian Capital Territory<sup>77</sup> and the Commonwealth

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<sup>67</sup> *R v Hereford Magistrates’ Court, ex parte Rowlands* [1998] QB 110 at 117 per Lord Bingham CJ.

<sup>68</sup> See Cronin and Hunter above n 59, 97 and Sanders and Young, above n 27, 485.

<sup>69</sup> See, for example, *Ibid*, 552 and Darbyshire, above n 27, 628.

<sup>70</sup> See, for example, Moynihan, above n 23, 76 and King, M, *et al*, *Non-Adversarial Justice* (Annandale, Federation Press, 2009) p 9.

<sup>71</sup> See s 3(2)(a) of the *Prosecution of Offenders Act* 1985 (UK). The prosecution advocate in the summary court may either be a lawyer or an “associate prosecutor” under s 55 of the *Crime and Disorder Act* 1997 or a legally qualified agent instructed by the CPS, see Sanders and Young, above n 27, 486-487 and Sprack, above n 65, 57-60.

<sup>72</sup> Sanders and Young, above n 27, 364. About a quarter of summary criminal cases in England are brought by various non-police agencies, see Sprack, above n 65, 62 and Slapper, G, and Kelly, D, *The English Legal System 2009-2010 (10th ed)* (Abingdon, Cavendish, 2009) p 483.

<sup>73</sup> Sanders and Young, above n 27, 378.

<sup>74</sup> *Ibid*, 364-368. There is no definitive list of the other agencies that may prosecute in the summary courts, see House Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (London, Great Britain Parliament: House of Commons, 2008) p 48 at [116].

<sup>75</sup> Lewis, C, “The Prosecution Service Function within the English Criminal Justice System” in Jehle, J, and Wade, M, (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power across Europe* (Berlin, Springer, 2006) p 164.

<sup>76</sup> Padfield, N, quoted in House of Commons Justice Committee, above n 74, Evidence, p 6. Many of the non-police prosecution agencies in areas such as the environment and occupational health and safety prefer to secure compliance with the relevant law through the use of education, advice and persuasion rather than prosecution and utilise the option of a criminal prosecution as a “last resort”, see Johnstone, above n 65, 3-4 and 84-85. See also House of Commons Criminal Justice Committee, above n 74, 50; Lidston, above n 65 and Sanders and Young, above n 27, 364-380.

<sup>77</sup> See s 6 (1)(c) of the *Director of Public Prosecutions Act* 1990 (ACT).

criminal jurisdiction<sup>78</sup> where the ACT and Commonwealth Directors of Public Prosecutions respectively are largely responsible for the conduct of summary prosecutions.<sup>79</sup> Therefore in England, the Commonwealth and the Australian Capital Territory prosecution lawyers, as opposed to police officers, both prepare and appear in court to conduct summary prosecutions. However, a very different situation exists in the rest of Australia where the Directors of Public Prosecutions, whilst conducting committal proceedings in the Magistrates’ Courts,<sup>80</sup> generally refrain from the conduct of summary prosecutions.<sup>81</sup> These Directors either possess only a limited power to conduct summary prosecutions as in New South Wales<sup>82</sup> and Victoria<sup>83</sup> or, if he or she has that power, in practice rarely chooses to exercise it as in Queensland,<sup>84</sup> South Australia,<sup>85</sup> Tasmania<sup>86</sup> and Western Australia.<sup>87</sup> Therefore, as Corns notes, “The police [in Australia] are responsible for the overwhelming number of summary prosecutions.”<sup>88</sup>

[1.2.5] Though there are suggestions that a non-partisan role should extend to the conduct of summary prosecutions, whether generally<sup>89</sup> or in specific contexts,<sup>90</sup> a

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<sup>78</sup> See s 6 (1)(d) of the *Director of Public Prosecutions Act* 1983 (Cth).

<sup>79</sup> See Corns (1999), above n 64, 1, n 1 and 8 and Krone, above n 64, 9-11. Though the ACT DPP conducts summary “criminal” prosecutions brought by the police, the role of the Commonwealth DPP extends beyond the police to a wide range of prosecutions instituted by various Commonwealth agencies.

<sup>80</sup> See Corns (1999), above 64, 1, n 1. Though the extent of this involvement varies from jurisdiction to jurisdiction, see Corns (2000), above n 64, 290.

<sup>81</sup> Krone, above n 64, 12-13. The Northern Territory operates a hybrid situation of both prosecuting lawyers and police prosecutors under the supervision of the DPP, see s 13 of the *Director of Public Prosecutions Act* (NT) and Corns (2000), above n 64, 297-298.

<sup>82</sup> See s 8 of the *Director of Public Prosecutions Act* 1986 (NSW)

<sup>83</sup> See s 22(1)(ab) and (b) of the *Public Prosecution Act* 1994 (Vic).

<sup>84</sup> See s 10(1)(a) and (c) of the *Director of Public Prosecutions Act* 1984 (Qld).

<sup>85</sup> See s 7(1)(a) and (b) of the *Director of Public Prosecutions Act* 1991 (SA).

<sup>86</sup> See s 12(1)(a) of the *Director of Public Prosecutions Act* 1986 (Tas).

<sup>87</sup> See s 11(1) and (2) of the *Director of Public Prosecutions Act* 1991 (WA).

<sup>88</sup> Corns (2000), above n 64, 291.

<sup>89</sup> See, for example, Murray, J, “The Paralegal Police Prosecutor: For How Long?” in Vernon, J, and Regan, F, (eds), *Improving Access to Justice: the Future of Paralegal Professionals: proceedings of a conference held 19-20 February 1990* (Canberra, Australian Institute of Criminology, 1991) p 97 at 98-99 and St John, R, “The Role of the Police in Courts” in Chappell, D, and Wilson, P (eds), *The Australian Criminal Justice System* (Sydney, Butterworths, 1972), p 493 at 495-496.

<sup>90</sup> The summary courts, in particular, have witnessed the emergence of specialised “problem solving” courts over recent years influenced by principles of therapeutic and restorative justice, see Berman, G, and Feinblatt, J, *Good Courts: the Case for Problem Solving Justice* (New York, the New Press, 2005); Frieberg, A, “Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism” in McMahon, M (ed), *Therapeutic Jurisprudence* (Annandale, Federation Press, 2003) p 6; Hora, P, Schma, W, and Rosenthal, J, “Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionising the Criminal Justice System’s Response to Drug Abuse and Crime in America” (1999) 74 NDLR 439; Gutman, J, “The Reality of Non-Adversarial Justice: Principles and Practice” (2009) 19 Deakin L Rev 29 at 39-42 and Winick, B, “Therapeutic Justice and Problem Solving Courts” (2003) 30 Ford Urb L Rev 1056. The development of therapeutic justice and problem solving courts has important implications for the adversarial premise of criminal justice (see See Hora, Schma and Rosenthal, above n 90, 468-470, and 477-479; King *et al*, above n 70, 9 and 230-231 and Gutman, above n 90, 46) and, in particular for a less partisan prosecutorial role (see, for example, Hora, Schma and Rosenthal, above n 70, 477-479; Kaye, J, “Lawyering for a New Age” (1998) 67 Ford L Rev 1 at 3 and Worrall, J,

detailed study of summary prosecutions is beyond the scope of this Thesis.<sup>91</sup> There are several reasons for choosing to focus on the prosecutorial role in the higher courts.

[1.2.6] Primarily, it is prosecutorial practice in the higher courts that sets the standards for the conduct of summary prosecutions. The Directors in both England and Australia are able to set the benchmark for prosecutorial practice in the higher courts and, whether expressly or by implication, in the summary courts. This is despite the fact that there are significant practical differences between England and Australia and further within Australia as to the operation of the prosecution regimes at the higher courts.

[1.2.7] Though a detailed account of the administrative practices of the prosecuting authorities in England and Australia is beyond the scope of this Thesis, it is clear that the nature and structure of the regime for higher court prosecutions reinforces the focus of this Thesis upon prosecution in the higher courts. Though the occasional higher court case may be prosecuted by agencies other than the CPS or the Office of the DPP, not only do these other agencies have “markedly different” aims and policies independent of both the police and each other,<sup>92</sup> the overwhelming majority of higher court cases are conducted by the Directors of Public Prosecutions,<sup>93</sup> whether through their “in house” staff and/or counsel instructed on their behalf. The CPS is “by far the biggest player in the delivery of prosecution services.”<sup>94</sup> In both England<sup>95</sup> and Australia<sup>96</sup> the Directors of Public Prosecutions are vested with the responsibility for the conduct of most criminal proceedings at the higher courts.

[1.2.8] In England the CPS is responsible for the preparation and conduct of prosecutions in both the summary (unlike the position in most of Australia) and the higher courts. The

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“Prosecutors in Problem Solving Courts” in Worrall, J, and Nugent-Borakove, M, *The Changing Role of the American Prosecutor* (Albany, State University of New York Press, 2008) p 131-144). The impact of these developments on the prosecutorial role is beyond the scope of this Thesis given problem solving courts deal mainly with the sentencing and disposition of offenders and the focus of this Thesis is on prosecutorial duties in respect to disclosure and calling witnesses in the context of the adversarial criminal trial.

<sup>91</sup> Though in relation to prosecution disclosure in the summary courts, see further Chapter 5, n 56; the discussion in Chapter 5 at [5.6.13] (especially n 198) and Chapter 9, n 192, and in relation to the prosecution’s choice of witnesses in summary trials, see further the discussion in Part 9 of Chapter 9.

<sup>92</sup> White, R, quoted by House of Commons Justice Committee, above n 74, 49 at [119]. See further above n 76.

<sup>93</sup> In England the CPS noted that in 2007/2008 it was responsible for completing 96,992 cases at the Crown Court. In contrast, the other main agencies involved in prosecutions such as the Inland Revenue (270 completed cases), the Health and Safety Executive (565 completed cases) and the Serious Fraud Office (16 completed cases) were responsible for a comparatively miniscule number of higher court prosecutions, see House of Commons Justice Committee, above n 74, 48-49 at [117]. Though similar figures aren’t available for Australia, it seems unlikely that the situation would be different there. In addition the role of the DPP in some Australian jurisdictions such as the Commonwealth and Tasmania extends to the conduct of non-police higher court prosecutions.

<sup>94</sup> House of Commons Justice Committee, above n 74, 47 at [115].

<sup>95</sup> See s 3(2) of the *Prosecution of Offences Act 1985* (Eng).

<sup>96</sup> See s 6(1)(a) and (b) of the *Director of Public Prosecutions Act 1990* (ACT), s 6 (1)(a) and (c) of the *Director of Public Prosecutions Act 1983* (Cth), s 7(1)(a) of the *Director of Public Prosecutions Act 1986* (NSW), s 12 of the *Director of Public Prosecutions Act* (NT), s 10(1)(a) of the *Director of Public Prosecutions Act* (Qld) 1984, s 7(1)(a) and (b) of the *Director of Public Prosecutions Act* (SA) 1991, s 12(1)(a) of the *Director of Public Prosecutions Act 1986* (Tas), s 22(1)(a) of the *Public Prosecutions Act* (Vic) 1994 and s 11(1) of the *Director of Public Prosecutions Act* (WA) 1991.

lawyers employed by the CPS (even the Director of Public Prosecutions)<sup>97</sup> originally had very limited rights of audience in the higher courts and could realistically only appear in the summary courts.<sup>98</sup> It was necessary for the CPS in higher court cases to act as an instructing solicitor and though responsible for the pre-trial preparation, to “brief out” almost all of its higher court advocacy to be carried out on its behalf by barristers from the “independent” Bar.<sup>99</sup> Over recent years the CPS has increasingly assumed the conduct of its own advocacy at the Crown Court,<sup>100</sup> but it has undertaken to support an independent Bar by continuing to instruct external counsel at a substantial rate.<sup>101</sup>

[1.2.9] By contrast in Australia the various DPP Offices have never been subject to the previous English restrictions on “in house” higher court advocacy.<sup>102</sup> Though the Australian Directors can be represented at the higher courts by either “in house” lawyers or by “outside” lawyers instructed on their behalf,<sup>103</sup> the Australian policy and practice, unlike England, is not only to prepare, but to conduct “in house” most of their own prosecutions and trials at the higher courts.<sup>104</sup> Although all the Australian DPP offices have specialised higher court trial advocates,<sup>105</sup> internal practices differ as to how trials are carried out. On the one hand this may be achieved by statutorily appointed “Crown Prosecutors” as in New South Wales,<sup>106</sup> Victoria<sup>107</sup> and Queensland<sup>108</sup> who “effectively act

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<sup>97</sup> McLeod, J, “CPS Pushes for Trial Powers” (1992) 82 LSG 5 noting the “affronted” reaction of Barbara Mills QC, the then English DPP, to her inability to no longer appear in the Crown Court with her appointment as DPP.

<sup>98</sup> See Sanders and Young, above n 27, 486; Sprack, above n 65, 59 and Her Majesty’s Crown Prosecution Service Inspectorate, *Report of the Thematic Review of the Quality of Prosecution Advocacy and Case Presentation* (London, HMCPS Inspectorate, 2009) p 18 at [2.7]-[2.8].

<sup>99</sup> See *Ibid.*

<sup>100</sup> See *Ibid.*, 19-20 at [2.9]-[2.14] and Gibb, F, “Are Crown Prosecution Service Advocates Any Good?,” *Sunday Times*, 22 July 2009. This trend has not gone without criticism, notably from the independent Bar, see, for example, Ackner, D Lord, “More Power to the Executive” (1998) 148 NLJ 1512 and Ley, N, “Rights of Audience: Don’t let them have them” (1995) 146 NLJ 1124.

<sup>101</sup> See Crown Prosecution Service, *CPS/Bar Framework for Prosecution Advocates in the Crown Court* (London, CPS, 2006).

<sup>102</sup> See HMCPSI, above n 98, 18 at [2.6].

<sup>103</sup> See s 16 of the *Director of Public Prosecutions Act* 1990 (ACT), s 15 of the *Director of Public Prosecutions Act* 1983 (Cth), s 21 of the *Director of Public Prosecutions Act* 1986 (NSW), s 22 of the *Director of Public Prosecutions Act* (NT), s 10(4) of the *Director of Public Prosecutions Act* (Qld) 1984, s 7(7) of the *Director of Public Prosecutions Act* (SA) 1991, s 12(1)(d) of the *Director of Public Prosecutions Act* 1986 (Tas), s 11 of the *Public Prosecutions Act* 1994 (Vic) and s 21(1) of the *Director of Public Prosecutions Act* (WA) 1991.

<sup>104</sup> See, for example, Cowdrey, N, *Office of the Director of Public Prosecutions (New South Wales) Annual Report 2009-2010* (Sydney, Office of the DPP, 2010) p 14; McGrath, J, *Office of the Director of Public Prosecutions for Western Australia: Annual Report 2009/2010* (Perth, Office of the DPP, 2010) p 19 and Wilde, R, “External Briefing Policy,” at [1], available at: [http://www.nt.gov.au/justice/dpp/html/external\\_briefing.html](http://www.nt.gov.au/justice/dpp/html/external_briefing.html). Though all the Australian DPP Offices appear, on occasion at least, to “brief out” higher court advocacy.

<sup>105</sup> As revealed by a scrutiny of the various websites of the Australian DPPs.

<sup>106</sup> See s 5 of the *Crown Prosecutors Act* 1986 (NSW). New South Wales also has the office of “Senior Crown Prosecutor”, see s 4A.

<sup>107</sup> See s 31(1) and s 36 of the *Public Prosecutions Act* 1994 (Vic). Victoria also has the offices of “Senior Crown Prosecutor” (s 31(3)) and “Senior Crown Prosecutor (Major Trials)” who has “special responsibility in relation to trials of a particularly complex nature” (see s 31(4)) and “Associate Crown Prosecutor” (s 36A and s 36E).

<sup>108</sup> See s 21(1)(a) of the *Director of Public Prosecutions Act* (Qld) 1984.



as the ODPP’s ‘in house counsel’<sup>109</sup> and who are formally “instructed” by a Solicitor for Public Prosecutions<sup>110</sup> (probably reflecting the divided structure of the local legal professions). On the other hand, whilst the same formal practices and offices do not exist in the Australian Capital Territory, the Northern Territory, South Australia, Tasmania and Western Australia (probably reflecting the fused structure of the local legal professions), as a matter of internal, as opposed to statutory, practice these offices have a system of allocating trials to specialised advocates though it is still not unusual for even “general” DPP lawyers to act as “prosecutors” and to conduct higher court trials.<sup>111</sup>

[1.2.10] Despite the differences in internal practices, what is fundamental is that the Directors have a statutory power in both England<sup>112</sup> and all the Australian jurisdictions bar Tasmania<sup>113</sup> to issue formal Guidelines to govern the institution and conduct of prosecutions, whether at the higher or summary courts. These Guidelines can be of general application and are not confined to “in house” staff and can extend to anyone involved in the investigation and prosecution of criminal cases.<sup>114</sup> Formal prosecution Guidelines have been established in England and in all Australian jurisdictions, even Tasmania.<sup>115</sup> The *Code for Crown Prosecutors* (Eng), the *Guidelines for Prosecutors* (ACT), the *Prosecution Policy of the Commonwealth* (Cth), the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, the *Prosecution Guidelines 2005* (NT), the *Director’s Guidelines 2010* (Qld); the *Statement of Prosecution Policy and Guidelines* (SA), the *Prosecution Guidelines* (Tas), the *Prosecution Policy and Guidelines 2010* (Vic) and the *Statement of Prosecution Policy and Guidelines 2005* (WA) vary in scope and detail,<sup>116</sup> but all represent a conscious effort by the respective Directors to guide the exercise of prosecutorial discretion. Krone has described the publication and

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<sup>109</sup> Rapke, J, *Director of Public Prosecutions Annual Report (Victoria) 2009-2010* (Melbourne, Office of the DPP, 2010) p 3.

<sup>110</sup> See s 23(b) and s 26 of the *Director of Public Prosecutions Act 1986* (NSW) and ss 37-38 of the *Public Prosecutions Act 1994* (Vic).

<sup>111</sup> This emerges from both a scrutiny of the relevant DPP websites and personal experience. See also Pallaras, S, *Annual Report of the Director of Public Prosecutions (South Australia) 2007-2008* (Adelaide, Office of the DPP, 2008) p 2.

<sup>112</sup> See s 10(1) of the *Prosecution of Offences Act 1985* (UK).

<sup>113</sup> See s 12 (1) and (2) of the *Director of Public Prosecutions Act 1990* (ACT), s 11 (1) and (2) of the *Director of Public Prosecutions Act 1983* (Cth), s 13 of the *Director of Public Prosecutions Act 1986* (NSW), s 25(1) of the *Director of Public Prosecutions Act* (NT), s 11(1)(a) of the *Director of Public Prosecutions Act* (Qld) 1984, s 11(1) of the *Director of Public Prosecutions Act* (SA) 1991, s 24(1)(a) of the *Public Prosecutions Act* (Vic) 1994 and s 24(1)(a) of the *Director of Public Prosecutions Act* (WA) 1991. The *Director of Public Prosecutions Act 1986* (Tas) contains, oddly alone in Australia, no explicit power allowing the issue of similar Guidelines. The reason for this omission is unclear.

<sup>114</sup> See the references above at nn 112-113. Though these statutory powers and others (see, for example, s 14(2) of the *Director of Public Prosecutions Act 1986* (NSW)) allow the DPP to make guidelines with respect to the conduct of summary prosecutions, it is notable that the DPP Guidelines in New South Wales, South Australia, Tasmania and Victoria are largely confined to higher court prosecutions.

<sup>115</sup> Given the apparent absence in Tasmania of any legislative power for such Guidelines in Tasmania, they are presumably issued pursuant to the Director’s general powers.

<sup>116</sup> For example, though the Tasmanian Guidelines are confined to the grounds for the institution of criminal proceedings, the Victorian and NSW Guidelines amount to a comprehensive overview of the issues that are typically encountered in higher court prosecutions. Each consists of 34 detailed Guidelines, each Guideline covering a discrete subject.

acceptance of such Guidelines as “the most significant change to the administration of the criminal justice system” over recent years.<sup>117</sup> The two main purposes of such Guidelines, as the Commonwealth Attorney-General observes, “is to promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions....[and] to inform the public of the principles upon which the Office of the Director of Public Prosecutions performs its statutory functions.”<sup>118</sup>

[1.2.11] The Directors in both England and Australia are able through the establishment of such Guidelines and other mechanisms<sup>119</sup> to set the standards for prosecutions in the higher courts. However, the effect of these Guidelines is not confined to the higher courts. Even if the Guidelines in some jurisdictions are not expressed to extend in their application to non-DPP summary prosecutions,<sup>120</sup> in all jurisdictions the power of the Directors to make Guidelines extends to the conduct of summary prosecutions, whether by the police<sup>121</sup> or even other agencies.<sup>122</sup> The police profess to follow such Guidelines or a similar internal version of them, even in those jurisdictions where they still conduct summary prosecutions.<sup>123</sup> The Director, as the New South Wales Attorney-General remarked in 1986, “can bring about a more uniform prosecution policy throughout the various prosecuting agencies in this State.”<sup>124</sup> In England it has been observed that the

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<sup>117</sup> Krone, above n 64, 7.

<sup>118</sup> McClelland, R, Preface to the *Prosecution Policy of the Commonwealth*, p 1. See also the Introduction to the *Prosecution Guidelines* 2005 (NT).

<sup>119</sup> The CPS, for example, has comprehensive standard instructions to counsel instructed on its behalf at the Crown Court covering 37 different subjects that may arise in higher court prosecutions, see “CPS Instructions for Prosecuting Advocates”, available at: [http://www.cps.gov.uk/legal/p\\_to\\_r/prosecuting\\_advocates\\_instructions/](http://www.cps.gov.uk/legal/p_to_r/prosecuting_advocates_instructions/).

<sup>120</sup> The DPP Guidelines differ in their application to the summary courts. In England, the Australian Capital Territory and the Commonwealth the Guidelines extend to summary prosecutions given that in those jurisdictions the DPP and not the police are responsible for the conduct of summary prosecutions. The Guidelines in the Northern Territory, Western Australia and South Australia (see Abraham, W QC, *Director of Public Prosecutions Annual Report (South Australia) (2003/2004)* (Adelaide, Office of the DPP, 2004) p 17-18) extend expressly and in Queensland by implication to police prosecutors. In contrast, the Guidelines in New South Wales, Tasmania and Victoria do not.

<sup>121</sup> See above nn 112-114.

<sup>122</sup> See, for example, s 14(2) of the *Director of Public Prosecutions Act* 1986 (NSW) which extends the NSW Director’s guideline power to the summary prosecution of indictable offence and “prescribed summary offences” by the police or others and s 11(1) and (2) of the *Director of Public Prosecutions Act* 1983 (Cth) which allows the Commonwealth Director to furnish guidelines to the Commissioner of the Australian Federal Police, the Chief Executive Officer of the Australian Government solicitor and any other person who investigates, institutes or carries on prosecutions for offences against the laws of the Commonwealth.

<sup>123</sup> See Krone, T, “Heading Upstream: Prosecution Intervention in the Investigative Process,” Paper presented at the Criminal Investigations Workshop, ARC Centre of Excellence in Policing and Security, Australian National University, Canberra, 10-11 December 2009, available at: [http://ceps.anu.edu.au/events/criminal\\_investigations\\_workshops/papers/Tony%20Krone%20-%20Heading%20upstream.pdf](http://ceps.anu.edu.au/events/criminal_investigations_workshops/papers/Tony%20Krone%20-%20Heading%20upstream.pdf), p 4 and McGonigle, S, “Public Accountability for Police Prosecutions” (1996) 8 Auck U L Rev 163 at 170. McGonigle observes that the assertion of the New Zealand police of their adherence to the national *Solicitor-General’s Guidelines* in relation to summary prosecutors was undermined as all of the past or present police prosecutors that he spoke to as part of his research volunteered they had neither never used or even seen the Guidelines, see *Ibid*. The question of whether, or to what extent, the various DPP Guidelines or any similar internal police guidelines apply in practice to the conduct of Australian police summary prosecutions is beyond the scope of this Thesis to pursue.

<sup>124</sup> Krone, above n 64, 9. See also Abraham, above n 120, 17-18.

many national CPS policies, whether the formal *Code for Crown Prosecutors* or internal guidelines, “set uniformity in what prosecutors do throughout the country”.<sup>125</sup> Even apart from the Guideline power, the power of the Directors in England and all Australian jurisdictions extends to the conduct of summary prosecutions.<sup>126</sup> The prosecutorial role in the higher courts sets the standards for prosecutorial practice in the lower courts and justifies the focus of this Thesis on the higher courts.

[1.2.12] The fact that prosecutorial practice in the higher courts should set the “benchmark” of what happens in the summary courts, is consistent with the wider proposition that it is the higher courts through their judgments and practices in assessing what is appropriate and “fair” in the context of trial on indictment that also determines what will happen in the summary courts. The procedures associated with trial on indictment at the higher courts, notably before a jury,<sup>127</sup> are widely perceived to represent the “gold standard”<sup>128</sup> of criminal justice to be applied regardless of the level of the criminal court. “There cannot be a lesser or different standard of justice in the Magistrates’ Court than in the Crown Court.”<sup>129</sup> It is the practices in the higher courts, especially as Darbyshire notes in relation to the question of disclosure by the prosecution of relevant material,<sup>130</sup> that govern the practices that will be followed in the lower courts.<sup>131</sup> “Superior judges”, as Darbyshire explains, “interpret criminal statutes almost as if Magistrates did not exist...when the Court of Appeal or the House of Lords develop criminal law and evidence, they speak in the language of trial on indictment and pay no regard to how their reasoning will apply to summary trial.”<sup>132</sup> These observations are of equal application to Australia.<sup>133</sup> It follows that even with bifurcated practice divided between the higher and summary courts, it is still prosecutorial practice in the higher

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<sup>125</sup> Lewis, above n 75, 157.

<sup>126</sup> See above n 71 (England), n 77 (ACT), n 79 (Commonwealth), n 81 (Northern Territory), n 82 (NSW), n 83 (Victoria), n 84 (Queensland), n 85 (South Australia), n 86 (Tasmania) and n 87 (Western Australia). Though whether these powers are necessarily exercised in practice is a different proposition, see above n 114.

<sup>127</sup> Trial by jury is a “venerated institution” (Fitzpatrick, P, “The British Jury” [2010] CSLR 1) that is widely asserted to be “rightly heralded as the most appropriate organ for determining guilt” (*Ibid*, 15). Whether this faith in the jury is justified is beyond the scope of this Thesis to consider. Trial by jury, as Lloyd-Bostock and Thomas note, “evokes passionate and often extreme views” between its defenders and critics, see Lloyd-Bostock, S and Thomas, C, “Decline of the Little Parliament: Juries and Jury Reform in England and Wales” (1999) 62 Law & Cont Problems 7.

<sup>128</sup> Sanders, A, “Core Values, the Magistracy and the Auld Report” (2002) 29 Jour Law & Soc 324 at 339. See also Vennard, above n 66, 1.

<sup>129</sup> *R v Stipendiary Magistrate for Norfolk, ex parte Taylor* [1998] Crim LR 276 at 277. This observation was made significantly in regards to the prosecution’s duty of disclosure in summary cases, see further Chapter 5, n 191.

<sup>130</sup> Darbyshire, above n 27, 634-635.

<sup>131</sup> *Ibid*, 634-636.

<sup>132</sup> *Ibid*, 634-635. Darbyshire whilst acknowledging this proposition is critical of this trend as ignoring the reality that most criminal cases are dealt with in the lower courts, see *Ibid*, 634-641.

<sup>133</sup> See, for example, Chesterman, M, “Criminal Trial Juries: From Penal Colonies to Federal Democracy” (1999) 62 Law & Cont Problems 69 at 101-102.

courts that sets the “gold standard” for practice in the lower courts thus justifying the focus in this Thesis on the higher courts.<sup>134</sup>

[1.2.13] There are other factors that justify the concentration on the higher courts. Summary prosecutions, whether by the police<sup>135</sup> or other agencies,<sup>136</sup> despite their importance, have largely eluded meaningful analysis or academic scrutiny.<sup>137</sup> This lack of study especially extends to police prosecutors. Krone refers to the “impenetrability of this area of the law”<sup>138</sup> and notes that the work of the police prosecutors in the summary courts is “largely hidden”<sup>139</sup> and “virtually invisible”.<sup>140</sup> Krone notes that there is a lack of quantitative and qualitative data to assess the current work of police prosecutors.<sup>141</sup> He notes that whilst the police may claim to operate in accordance with the DPP prosecution policies in each State, there is no way that one can be confident in practice this is so.<sup>142</sup> Krone concludes that summary prosecutions in Australia, despite their importance, do not lend themselves to any meaningful consideration of the prosecutorial role:

The system of police prosecutions is opaque and matters are resolved “in house” within a disciplined command structure. That is the situation in each Australian state, where there is no established role for the independent prosecutor in police summary cases. Existing DPP prosecution practices are based on [higher court] trial practice and do not readily apply in the summary jurisdiction.<sup>143</sup>

[1.2.14] Though the system of police prosecutors is not without its defenders,<sup>144</sup> the practice of police officers acting as prosecution advocates has proved a longstanding source of concern<sup>145</sup> and been often questioned.<sup>146</sup> There are strong criticisms on

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<sup>134</sup> It is accepted that in practice this may not always happen, but this is not the issue being explored in this Thesis.

<sup>135</sup> See McGonigle, above n 123, 177, Krone above n 64, 5 and Krone above n 123, 11.

<sup>136</sup> Johnstone, above n 65, 3, especially n 20.

<sup>137</sup> See Darbyshire, above n 27, 636-637.

<sup>138</sup> Krone, above n 123, 11.

<sup>139</sup> *Ibid*, 11, n 35.

<sup>140</sup> *Ibid*, 11.

<sup>141</sup> *Ibid*. See also Ashworth, A, “Prosecution, Police and Public – a Good Guide to Good Gatekeepers” (1984) 23 *How Jour Crim Just* 65-87, highlighting the pre-CPS lack of knowledge about the principles on which prosecution decisions were taken in the summary prosecution of minor crimes and the need for further research in this area.

<sup>142</sup> Krone, above n 64, 4. See also above n 123.

<sup>143</sup> Krone, above n 123, 9.

<sup>144</sup> See, for example, Drew, K, “The New South Wales Police Prosecutor” in Vernon and Regan, above n 89, p 103 at 104-105 and Murray above n 89, 98-99.

<sup>145</sup> See the discussion in Chapter 2 at [2.7.12]-[2.7.13].

<sup>146</sup> See Beck, S, “Under Investigation: A Review of Police Prosecutions in New Zealand’s Summary Jurisdiction” (2006) 12 *Auck Uni L Rev* 150. The argument about police prosecutors has persisted to the present day in Australia, see Krone above n 64, 2 and Corns (2000), above n 64, 281 and 292. Although in England it ceased to be a live issue following the *Prosecution of Offences Act* 1985 which prohibited police officers from acting as advocates in public prosecutions, the use of police officers in the Australian summary courts as prosecution advocates remains widespread, see above at [1.2.4]. Opinion on this practice remains divided, see below at [1.2.14]. Glanville Williams offers a summary of the arguments in favour and against the employment of serving

grounds of both principle<sup>147</sup> and practice<sup>148</sup> of police prosecutors and regular calls for their replacement by an "independent" English style model based on independent prosecuting lawyers free from police control.<sup>149</sup> It is often asserted to be necessary for independence and impartiality in prosecutorial decision making for there to be "the unambiguous separation of the roles of investigator and prosecutor".<sup>150</sup> There is said to "exist a fundamental conflict of interest where the same agency is responsible for both the investigation and prosecution of the same criminal offence."<sup>151</sup> However, despite these criticisms and regular expressions of concern in various Australian official reports,<sup>152</sup> police prosecutors in the summary courts in Australia have proved surprisingly resilient and it seems unlikely that they will be replaced in the near future.<sup>153</sup> As a former South Australian Director of Public Prosecutions observed, "The issue of police prosecution services remains under review although the prospect of the [DPP's] Office taking over summary prosecutions in the foreseeable future appears to be remote... for economic and geographical considerations."<sup>154</sup>

[1.2.15] Although it is acknowledged that prosecutorial practice in the summary courts would make an important area of study, the impenetrability and lack of qualitative data in this area would mean that any study would amount to a separate Thesis involving a different methodology to that used in this Thesis. A study of prosecutorial practice in the higher courts, by way of contrast, is not hampered by the same impenetrability as arises with summary prosecutions. As Krone observes:

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police officers as advocates in criminal proceedings, see Williams, G, "Advocacy by Police and Justices' Clerks" [1956] Crim LR 169 at 170-174. It is beyond the scope of this Thesis to offer any conclusion about this issue.

<sup>147</sup> There is said to be a need for greater accountability (see Krone, above n 64, 4-5; Corns (2000), above n 64, 302 and McGonigle, above n 123, 172-173) and consistency in decision making (see Krone, above n 64, 5).

<sup>148</sup> It is asserted that most police prosecutors are legally unqualified and ill trained for their task (see Murray above n 89, 98 and Corns (2000), above n 64, 301-302), the use of police prosecutors is ineffective and it is not a police "core" function (see *Ibid*, 302 and Krone, above n 64, 6) and the removal of police prosecutors would free highly trained officers for "frontline" police duties (see Guest, D, "WA's Police Prosecutors could lose Role", *The Australian*, 24 October 2008) and lead to less summary trials as more cases are resolved or abandoned (see *Ibid*). There have even been allegation of overzealous and corrupt conduct by police prosecutors as recently as 1995, see Stewart, D, "Cash under the Bench," *The Australian*, 26 February 2007, p 8.

<sup>149</sup> See Krone, above n 64, 2 and 20 and Corns (2000), above n 64, 309.

<sup>150</sup> Narey, M, *Review of Delay in the Criminal Justice System* (London, Home Office, 1997) p 9. See also the discussion in Part 4 of Chapter 4 at [4.4.4].

<sup>151</sup> Corns (2000), above n 64, 301. See also Krone, above n 64, 6-8 and St John, above n 89, 493-500. See further the discussion in Chapter 2 at [2.7.14], especially Chapter 2, n 260.

<sup>152</sup> See, for example, Wood, J Justice, *Royal Commission into the NSW Police Service (Vol (2))* (Sydney, Government Printer, 1997) p 295-300 and the other references listed by Krone, above n 64, 11-12 and Corns (2000), above n 64, 295-297.

<sup>153</sup> See *Ibid*, 307-308 and Drew, above n 144, 104-105. Krone notes the "very strong cultural and historical inhibitions" to any change, see Krone, above n 64, 2. Corns also notes the likely cost of replacing police prosecutors (Corns (2000), above n 64, 306) and that the issue of police summary prosecutions in Australia has "little political purchase" and generates little public concern (see *Ibid*, 304-305).

<sup>154</sup> Rolfe, P, *Director of Public Prosecutions Annual Report (South Australia) (1999/2000)* (Adelaide, Office of the DPP, 2000) p 1.

The use of discretion by the DPP in each jurisdiction in relation to indictable charges [in the higher courts] is highly visible. The decisions of the DPP affect cases in the public domain and we are always aware of the effect of DPP action, even if the reasoning applied in particular cases is not always published.<sup>155</sup>

[1.2.16] Furthermore the type of offences and cases typically encountered in the higher courts lends themselves for the purposes of this Thesis to a study of the prosecutorial role. Though offences of both greater gravity<sup>156</sup> and complexity<sup>157</sup> have been increasingly entrusted to the Magistrates’ Courts over recent years, this should not obscure the fact that “Magistrates’ Courts frequently attract comment for their role as a conveyor belt for the guilty pleas which constitute 95% of their workload.”<sup>158</sup> The bulk of summary cases still involve routine “high volume” crimes, or as McBarnet observes, a workload that is “overwhelmingly trivial... ‘minor offences’, ‘everyday offences’, ‘the most ordinary cases’, ‘humdrum’ events.”<sup>159</sup> Such cases are typically dealt with in a matter of minutes.<sup>160</sup> As Krone observes, “The process for the prosecution of summary cases is based on the entry of guilty pleas in the majority of cases without the preparation of a prosecution brief of evidence.”<sup>161</sup> In contrast, in the relatively small proportion of cases, namely the serious and complex offences, that filter beyond the Magistrates’ Courts to the higher courts to be dealt with,<sup>162</sup> it is extremely likely that a proper brief of evidence will have to be prepared

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<sup>155</sup> Krone, above n 64, 4.

<sup>156</sup> It has become routine over recent years in both Australia (see Drew, above n 144, 104, n 3; Corns (2000), above n 64, 305 and Krone, above n 64, 13) and England (see Darbyshire above n 27, 628 and 630 and Sanders and Young, above n 27, 542) to reclassify offences with a view to encouraging or compelling summary disposal.

<sup>157</sup> See Murray, above n 89, 100-101. Murray describes a not unknown scenario encountered in the Magistrates’ Court of a legally unqualified and ill-prepared police prosecutor facing a Queen’s Counsel and instructing solicitor and complex legal arguments that would tax most lawyers, see *Ibid*, 97.

<sup>158</sup> McBarnet, B, “Magistrates’ Courts and the Ideology of Justice” (1981) 8 Brit Journ Law & Soc 181. See also McConville, M, *et al*, *Standing Accused: the Organisation and Practices of Criminal Defence Lawyers* (Oxford, Clarendon Press, 1994) p 57-59 and 211. The reference to the high summary guilty plea rate remains valid. About 90% of cases in the summary courts result in pleas of guilty. This applies in both England (see Darbyshire above n 27, 629, noting that 81% of accused plead guilty in person and a further 10% by post) and Australia (see Krone, above n 123, 27, noting an 87% guilty plea rate in the NSW Local Court and Murray, above n 89, 98 (90%)).

<sup>159</sup> McBarnet, above n 158, 189. See also McConville *et al*, above n 158, 58-59 and Sanders and Young, above n 27, 487, n 18. Though McBarnet’s reference to the work of the summary courts as “the dross of the criminal courts” (see Law Society, 23 August 1977, quoted by McBarnet, above n 158, 195) may be exaggerated, various authors highlight the “ideology of triviality that permeates the Magistrates’ Courts” (see Sanders and Young, above n 27, 488) and note, for example, that almost half of the workload of the Magistrates’ Courts in England consists of traffic offences, see *Ibid*, 487 and Lewis, above n 75, 164. See also McConville *et al*, above n 158, 211 and McBarnet, above n 158, 189-190.

<sup>160</sup> See, for example, a 2006 study quoted by the Chief Magistrate of Victoria which highlighted the “unrelenting” workload of the summary courts and that the average summary guilty plea took only seven minutes and 33 seconds to finalise, see Gray, I, “Sentencing in Magistrates’ and Local Courts in Australia”, Paper presented at the Sentencing Conference, National Judicial College of Australia, February 2008, available at: <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2008/Sentencing%20Conference%202008/papers/gray.pdf>, p 4-6. See also McBarnet, above n 158, 188 and Anleu, S, and Mack, K, ““Getting through the List’: Judgecraft and Legitimacy in the Lower Courts” (2007) 16 Soc & Legal Studies 341-361.

<sup>161</sup> Krone, above n 123, 27.

<sup>162</sup> Cavadino, P, and Gibson, G, *Introduction to the Criminal Justice Process* (Winchester, Waterside Press, 2002) p 32-33.

given the prosecution’s comprehensive modern duties of disclosure<sup>163</sup> and the simple though sometimes overlooked fact that thorough disclosure is necessary for the accused to decide how to plead.<sup>164</sup> It is in regard to such typical serious and/or complex cases at the higher courts as homicide, drug trafficking, robbery, rape, sexual abuse, commercial fraud, terrorism, large scale public disorder and the worst assaults rather than the typical routine summary case that the prosecutorial role can be authoritatively measured.

[1.2.17] It can therefore be seen for the reasons set out in this Part that prosecutions in the higher courts provide an appropriate context for the study of the development and nature of the prosecutorial role, especially in relation to the questions of prosecution disclosure and the prosecution’s choice of witnesses at trial. It is through the preparation for, and conduct of, the adversarial criminal trial in the higher courts that the prosecutorial role for the purposes of this Thesis can be assessed.

### **Part 3: The Prosecutor as a Minister of Justice: the “Silver Thread of the Web of the Criminal Law”**

[1.3.1] There have been numerous modern prosecutors, especially in the United States,<sup>165</sup> who have acted as overzealous advocates solely concerned with securing a conviction at any costs, ensuring that Nadjari’s combative perception of the prosecutorial role still resonates.<sup>166</sup> “The image of the prosecutor,” as Medwed emphasises, “as carnivorous aggressor in the adversarial den of the criminal courts is alive and well.”<sup>167</sup> Burke notes that, “Much of the literature on prosecutorial decision-making depicts prosecutors as

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<sup>163</sup> See further the discussion in Chapter 5.

<sup>164</sup> See Hannibal, M, and Mountford, L, *LPC Handbook on Criminal Litigation 2007-2008* (Oxford, Oxford University Press, 2007) p 33 at [2.6]. This is unsurprising. No defence lawyer should “of course” advise his or her client to plead guilty “unless the evidence against him [or her] is particularly strong and admissible”, see *Ibid*.

<sup>165</sup> The body of academic work describing the long catalogue to the present day of overly zealous, vindictive and even dishonest prosecutors in the United States is immense, see, for example, Burke, above n 48, 134-135; Gersham, B, “The Prosecutor’s Duty to Truth” (2001) 14 Geo J Legal Ethics 309 at 312-313; Hoeffel, above n 45, 1135 and 1148; Joy, above n 42, 339-340; Kirchmeier, J, *et al*, “Vigilante Justice: Prosecutor Misconduct in Capital Cases” (2009) 55 Wayne L Rev 1327; Possley, M, and Armstrong, K, “The Flip Side of a Fair Trial,” *Chicago Tribune*, 11 January 1999, p 1 (describing the “two ton contest” in Chicago in which prosecutors vied to try the heaviest defendants in the hope of becoming the first to convict “four thousand pounds of flesh”); Medwed above n 42, 36; Smith, above n 7, 390, n 220; Steele, W, “Unethical Prosecutors and Inadequate Discipline” (1985) 38 SW L Jour 965 at 966 and Speigelman, P, “Prosecutorial Misconduct in Closing Argument; the Role of Intention in Appellate Review” (1999) 1 Jour Prac & Process 115 at 115-118. Speigelman asserts that the present prosecutorial misconduct is so “commonplace” in the United States as to compare with even the notorious English prosecutors of the 1600s, *Ibid*, at 115.

<sup>166</sup> See, for example, the notorious case of *State v Beal* (1930) 154 SE 604 (see the description in “The Castonia Strikers Case” (1931) 44 Harv L Rev 1118-1123, especially 1122, n 21 and 1123, n 29); *R v McCullough* [1982] Tas R 43; *R v Pernich & Maxwell* (1991) 55 A Crim R 464; *R v M* [1991] 2 Qd R; *R v Charest* (1990) 57 CCC (3d) 312; *R v Ward* [1993] 1 WLR 619; *R v AR* (1994) 94 CCC (3d) 168; *Krieger v Law Society (Alberta)* (1997) 149 DLR (4<sup>th</sup>) 92; *Mohammed v State* [1999] 2 WLR 552; *R v B (RB)* (2001) 152 CCC (3d) 437; *R v Randall* [2002] 1 WLR 2237; *R v Bendetto & Labrador* [2003] 1 WLR 1545; *Ramdahnie v State* [2006] 1 WLR 796; *R v Mallard* (2005) 224 CLR 125 and *West Australia v JWRL* [2010] WASCA 179.

<sup>167</sup> Medwed, above n 42, 36.



zealous (and overzealous) advocates, motivated primarily to obtain and maintain the high conviction rates that earn them attention, praise and future career success.”<sup>168</sup>

[1.3.2] However, such conceptions are flawed. As Sir John Simon KC in 1926 observed:

Take for instance the true position of an advocate who has the duty of prosecuting in charge of crime. There are a great many people – you see it in magazines and story books constantly – who really believe that a barrister who has a brief to prosecute a criminal is aiming at securing his conviction at all costs. That is a libel and a travesty upon the whole profession of the law. The business of an advocate who is prosecuting a criminal is to be in the strictest sense a Minister of Justice. His duty is to see that every piece of evidence relevant and admissible is presented in due order, and without fear and favour; and unless there be some other advocate to assist the accused, it is his duty to present the evidence which is in favour of the accused with exactly the same force and fullness with which he calls attention to the circumstances tending to make a suspicion against him.<sup>169</sup>

[1.3.3] It is widely and often uncritically accepted that the prosecuting lawyer’s role in the criminal process is fundamentally different to both that of an advocate in civil proceedings and the lawyer acting for an accused person.<sup>170</sup> It is accepted that the defence lawyer in a criminal case or an advocate in a civil case is entitled to pursue all legitimate steps to advance the cause of his or her client.<sup>171</sup> In such circumstances “counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case.”<sup>172</sup> The prosecutor’s role differs fundamentally from that of defence counsel and he or she owes a far wider duty than simply to act for his or her “side” or “client.”<sup>173</sup> The

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<sup>168</sup> Burke, above n 48, 448-449. Though for a contrary view, see Smith, above n 7, 355-356. Smith notes that whilst defence lawyers are often despised, “Most people simply assume that prosecutors are good guys, wear the white hats and are on the ‘right’ side,” *Ibid*, 355.

<sup>169</sup> Simon, J, “The Vocation of an Advocate” [1922] Can LN 228 at 231. The prosecutorial role in the presentation of its case at trial and the discretion in calling witnesses will be discussed in Chapters 7-9.

<sup>170</sup> See, for example, Humphreys, above n 1, 745-746; Bull, H, “The Career Prosecutor of Canada” (1962) 53 Jour Crim Law, Criminology and Police Science 89 at 95-96 and Rogers, S, “The Ethics of Advocacy” (1897) 59 LQR 259 at 259-260. See also Chapter 4, n 10, and the discussion in Part 3 of Chapter 4.

<sup>171</sup> See, for example, [303(a)] of the *Code of Conduct of the Bar of England and Wales* (8<sup>th</sup> ed) available at: [http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section1codeofconduct/partiii\\_fundamentalprinciples/](http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section1codeofconduct/partiii_fundamentalprinciples/); Rules 3 and 16 of the *Australian Bar Association Model Rules* available at: <http://www.austbar.asn.au/images/stories/PDFs/CurrentABAModelRules2002.pdf>; Guiding Principles 1, 10 and 17 of Chapter IX of the *Code of Professional Conduct* of the Canadian Bar Association available at: <http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf> and Rule 1.3 (especially Comment [1]) of the *Model Rules of Professional Conduct* of the American Bar Association available at: <http://www.abanet.org/cpr/mrpc/rule13.html>.

<sup>172</sup> *Rondel v Worsley* [1969] 1 AC 191 at 227 per Lord Reid.

<sup>173</sup> See, for example, *US v Wade* (1967) 388 US 218 at 256-257, and English, M, “A Prosecutor’s Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?” (1999) 68 Ford L Rev 525 at 530-531. It has been argued, however, that the differences between the roles of the prosecutor and the defence lawyer or the civil advocate are exaggerated and may be more apparent than real owing to the paramount duty of all lawyers to serve the administration of justice, see McMunigal, K, “Are Prosecutorial Standards Different?” (2000) 68 Ford L Rev 1453 at 1472 and Dal Pont, G, *Lawyers’ Professional Responsibility in Australia and New Zealand* (4<sup>th</sup> ed) (Pymont, Lawbook Co, 2009), p 18.2 at [18.12]. Ipp notes that it is now clear that any notion that all lawyers owe an overriding duty to the administration of justice as an officer of the court that outweighs even their loyalty to their client. See Ipp, D, “Lawyers Duties to the Court” (1988) 114 LQR 63 at 83 and



prosecutor is entreated to assist the court in arriving at the truth of the matter in dispute and in securing justice. In the words of Humphreys, “Always the principle holds, that Crown counsel is concerned with justice first, justice second and conviction a very bad third.”<sup>174</sup>

[1.3.4] This responsibility applies in any criminal prosecution ranging from the trial of the gravest case of murder in full view of press and public through to the most minor charge in some provincial or rural court which may be the subject of a guilty plea and attracts neither the interest of press nor public.<sup>175</sup> This duty applies at all stages of the proceedings from the start to the finish<sup>176</sup> and extends to those involved in both the preparation and conduct of the prosecution case at trial.<sup>177</sup>

[1.3.5] The notion that the prosecutorial duty disallows any concern or motivation by the prosecutor about his or her “strike rate” in securing convictions at trial is often said to be an accurate statement of principle of the nature of the prosecutorial role and cannot be dismissed as cynical or hollow rhetoric.<sup>178</sup> As Rand J commented in his oft-quoted<sup>179</sup> observations of the nature of the minister of justice concept:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. *The role of prosecutor excludes any notion of winning or losing*; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.<sup>180</sup>

[1.3.6] This view commands widespread support in not only England and Australia,<sup>181</sup> but across the common law world<sup>182</sup> and beyond.<sup>183</sup> The following comments of Boyd

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Bress, D, “The Defence Counsel’s Responsibility” (1966) 64 Mich Law Rev 1493. See further the discussion and references in Chapter 2, n 74.

<sup>174</sup> Humphreys, above n 1, 746.

<sup>175</sup> Bowen-Colthurst, T, “Some Observations on the Duties of a Prosecutor” 25 Crim LQ 377 at 379.

<sup>176</sup> May, J, “The Responsibility of the Prosecutor to the Court” in Williams, J (ed) *The Role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economics and Political Science in January 1987* (Aldershot, Avebury, 1988) p 90.

<sup>177</sup> *R v Lucas* [1973] VR 693 at 705.

<sup>178</sup> See, for example, Bowen-Colthurst, above n 175, 377. See also Savage, C, “The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial” (1958) 1 Crim LQ 164 at 164-165. See also the discussion in Part 9 of Chapter 4 at [4.9.4].

<sup>179</sup> There is “perhaps no more often quoted statement” in the criminal law, see *Nelles v Ontario* [1989] 2 SCR 170 at 191.

<sup>180</sup> [1955] SCR 16 at 23-24.

<sup>181</sup> See the discussion in Part 3 of Chapter 4.

<sup>182</sup> See, for example, Law Society of Ireland, *A Guide to the Professional Conduct of Solicitors in Ireland* (2<sup>nd</sup> ed) (Dublin, Law Society of Ireland, 2002), p 26-27; Guiding Principle 9 of Chapter IX of the *Code of Professional Conduct* of the Canadian Bar Association available at: [http://www.cba.org/CBA/activities/\\_pdf/codeofconduct.pdf](http://www.cba.org/CBA/activities/_pdf/codeofconduct.pdf)

McBride JA, though relating to Canada, are equally applicable to both Australia and England in demonstrating the strength of the minister of justice role:

...to adapt the well known language of Viscount Starkey in *Woolmington* throughout the web of Canadian criminal law one golden thread is always to be seen, namely that it is the duty of the prosecution to prove the prisoner’s guilt, then equally it may be said that a *silver thread* is also always to be seen namely that Crown counsel regards himself as part of a court, and acts in a quasi-judicial capacity to assist towards the due administration of criminal law and justice, in contrast to the attitude of prosecuting counsel in some other countries.<sup>184</sup>

## Part 4: Why the Exercise of the Prosecutorial Role Matters

### Part 4(1): The Practical Importance of the Prosecutorial Role

[1.4.1.1] The exercise of the prosecutorial role in the criminal justice system matters; it is no idle or academic question given the importance of the factors of both practice and principle that the exercise of the prosecutorial role gives rise to. The questions of how the prosecuting lawyer discharges his or her functions and resolves the apparent tension of acting as a minister of justice within an adversarial criminal process are issues of great importance.

[1.4.1.2] The role of the prosecuting lawyer has become topical in recent years, if for no other reason than as part of the ever increasing political, press and public focus on issues of crime.<sup>185</sup> The increased focus of the media on criminal justice issues and the trial process has brought the prosecutorial office into prominence and greater public scrutiny.<sup>186</sup> It is no longer possible for the work of the prosecuting lawyer to be shielded

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and Rule 3.8 (especially Comment 1) of the *Model Rules of Professional Conduct* of the American Bar Association available at: [http://www.abanet.org/cpr/mrpc/rule\\_1\\_3.html](http://www.abanet.org/cpr/mrpc/rule_1_3.html). See further Chapter 4, n 10.

<sup>183</sup> See, for example, *The Standards of Professional Responsibility and the Statement of the Essential Duties and Rights of Prosecutors* of the International Association of Prosecutors (reproduced at Appendix A of the *Professional Guidelines* of the NSW DPP) and the *United Nations Guidelines on the Role of the Prosecutor* (produced at Appendix H of the *Professional Guidelines* of the NSW DPP).

<sup>184</sup> *R v Pearson* (1957) 21 WWR (NS) 337 at 348. Boyd McBride JA’s barbed reference to the practices of prosecutors in other countries is an apparent reference to the United States. It is routine for prosecutors in the United States to assume a combative approach and measure their “success” in terms of a healthy conviction rate as a stepping stone to political or professional advancement, see, for example, Medwed, above n 42, 44-46 and Ferguson-Gilbert, C, “It’s not whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality doing Justice for Prosecutors?” (2001) 38 Cal WL Rev 283 at 289-297. See further the discussion in Part 9 of Chapter 4 at [4.9.9], especially Chapter 4, n 233.

<sup>185</sup> There is a vast amount of literature on this trend, see, for example, Duffy, B, *et al*, “Closing the Gap: Crime Control and Public Perception” (2008) 22 Int Rev Law, Computer & Tech 17-44 and Schlesinger, P, and Tumber, H, *Reporting Crime: the Media Politics of Criminal Justice* (Oxford, Oxford University Press, 1994).

<sup>186</sup> Bugg, D, “The Role of the DPP in the 20<sup>th</sup> Century,” Speech given at the Judicial Conference of Australia, Melbourne, 13 November 1999, available at: <http://www.cdpp.gov.au/Director/Speeches/19991113db.aspx>. See also Green and Zacharias, above n 15, 845-846; Gomme, I, and Hall, M, “Prosecutors at Work: Overload and Strain” (1995) 23 Jour Crim Just 191 and Bugg, D, “Accountability, Independence and Ethics in the Prosecution Practice,” Speech given at the 18<sup>th</sup> Annual Conference of the International Society for the Reform of the Criminal Law, Montreal, 8 August 2004, available at: <http://www.cdpp.gov.au/Director/Speeches/20040808db.aspx>.

from the public gaze.<sup>187</sup> As the English Director of Public Prosecutions noted in 2009, “The days of decisions being made by deskbound prosecutors behind closed doors are long gone.”<sup>188</sup> Prosecutors will now come under both “more intense media and public scrutiny”<sup>189</sup> as well as “bitter criticism”<sup>190</sup> in respect of their decisions.<sup>191</sup> The prosecutor cannot retreat into the traditional veil of secrecy, which the office has enjoyed, and deflect public attention by recourse to previous practice or legal jargon<sup>192</sup> or the need for “independence”<sup>193</sup> in the discharge of his or her functions. As Angiolini explains, in comments, which though pertaining to Scotland are of equal application to either England or Australia:

That necessary [prosecutorial] independence should not, however, be used as an excuse for isolation, impenetrability or arrogance – or indeed for a lack of accountability. We prosecutors are prone to regard ourselves as champions of truth and justice, unbesmerched by commercial motivation or the need to act on the instructions of clients. But that self-assurance can bring complacency and the phrase ‘in the public interest’ can thereby be perceived by those we serve as a useful decoy to dazzle those who would otherwise probe decisions taken under that label. The need to protect prosecutorial independence over the years has, I believe, perpetuated a sense within Scotland of a need for a degree of isolation for the Prosecution Service. Closer interaction with victims and witnesses, the Police, Social Work and, indeed, the community we serve was perceived as activity which could endanger that independence and, consequently, was not something with which prosecutors were generally comfortable.<sup>194</sup>

[1.4.1.3] The nature and exercise of the prosecutorial role is of far more than academic interest. Whether the prosecuting lawyer should act as a zealous advocate or a minister of justice assumes the utmost importance when one considers the significance of the prosecutor’s role in the criminal process. The prosecutor is no mere functionary or bureaucrat. He or she plays a crucial role in the administration of criminal justice and the nature and exercise of the prosecutorial role is one of great legal and practical

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<sup>187</sup> Rosenberg, M, “The Attorney-General and the Prosecution Function and the Twentieth Century” (2009) 34 QJL 813 at 817.

<sup>188</sup> Starmer, K, “Outdated Crown Prosecution Service should be modernised, says DPP,” *The Guardian*, 30 November 2009.

<sup>189</sup> Rapke, J, *Annual Report of the Director of Public Prosecutions (Victoria) 2007-2008* (Melbourne, Office of the DPP, 2008) p 7.

<sup>190</sup> Spencer, R, *Jackson’s Machinery of Justice (8th ed)* (Cambridge, Cambridge University Press, 1989) p 232-233 referring to the often maligned Crown Prosecution Service of England. See, for example, Editorial, “Costly Blunders” (1993) 143 NLJ 1701 and Bentham, M, “Criminals allowed to walk free: Report blasts London CPS for Incompetence,” *London Evening Standard*, 16 March 2010. See also Chapter 4, n 1.

<sup>191</sup> The strong reaction to the decision of the West Australian DPP in 2010 not to bring charges against two security guards over the tragic death of an Aboriginal elder illustrates this trend, see Jones, L, “DPP Defends Prison Van Decision,” *Sydney Morning Herald*, 28 June 2010. See also the strong criticism directed at the West Australian DPP in relation to *West Australia v JWRL* [2010] WASCA 179. Murray P, “Chief Justice attacks DPP’s Hidden Evidence,” *The West Australian*, 21 September 2010. See further Chapter 5, n 329 and n 333.

<sup>192</sup> See, for example, *R v C, ex parte DPP* [1995] 1 Cr App R 136. See also Chapter 4, n 161.

<sup>193</sup> The term “independence” in this context is capable of differing interpretations. See further below n 245.

<sup>194</sup> Angiolini, above n 5.

importance.<sup>195</sup> Gersham comments, “It has always been my belief that, the prosecutor, more than any other government official, possesses the greater power to take away a person’s liberty or life at his discretion.”<sup>196</sup> Henry Jackson, when United States Attorney-General,<sup>197</sup> agreed:

The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous... While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.<sup>198</sup>

[1.4.1.4] Though these observations were offered with obvious reference to the United States,<sup>199</sup> their significance is not confined to that jurisdiction.<sup>200</sup> The prosecution lawyer across the common law world (and beyond)<sup>201</sup> whilst, perhaps, not possessing the sweeping powers of the American prosecutor noted by Jackson, nevertheless, acts as a “vital and influential, indeed pivotal, cog in the criminal justice process.”<sup>202</sup> Fionda describes how “the unique, central and pivotal position of the prosecutor in the structure of the criminal justice process” means that prosecutorial decisions “can have wide-ranging, reverberating effects on the decision-making process of all other agencies throughout that process.”<sup>203</sup> The prosecutor<sup>204</sup> occupies a position in society, which is as powerful as it is privileged and he or she can draw on the vast resources of the State and there is often little margin of error in the decisions that the prosecutor takes which “may profoundly affect the lives of others.”<sup>205</sup> As the Alberta Court of Appeal observed in connection with a complaint against a prosecutor that he had not acted in the manner expected of a minister of justice, by delaying disclosure of vital material that exonerated an accused remanded in custody and charged with murder,<sup>206</sup> “The responsibilities of the

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<sup>195</sup> See, for example, Dennis, above n 45, 132-134 and 135-136; Gersham, above n 50, 448; Hoeffel, above n 45, 1138; Krug, above n 16, 643 and Melilli, above n 12, 671-673.

<sup>196</sup> Gersham, above n 165, 311.

<sup>197</sup> Jackson would later serve as a lead prosecutor at the Nuremburg War Crimes trials and as a distinguished Justice of the Supreme Court of the United States.

<sup>198</sup> Jackson, R, “The Federal Prosecutor” (1940) XXXI Jour Crim L & Crim 3 (reporting speech given 1 April 1940).

<sup>199</sup> See, for example, Dennis, above n 45, 132.

<sup>200</sup> Byrett, K, and Osborne, P, *Criminal Prosecutors Procedure and Practice: International Perspectives, Review of the Criminal Justice System in Northern Ireland* (Belfast. Northern Ireland Office, 2000) p 15.

<sup>201</sup> See *Ibid* and Fionda, J, *Public Prosecutors and Discretion: a Comparative Study* (Oxford, Oxford University Press, 1995) p 1-2 (noting both the English and European dimensions of the prosecutorial role).

<sup>202</sup> Williams, J, “Introduction: the Role of the Prosecutor” in Williams above n 176, 6.

<sup>203</sup> Fionda, above n 201, 1.

<sup>204</sup> It is important to note that any lawyer who prosecutes on behalf of the public in any court, whatever their style or designation, is to be regarded as the “prosecution lawyer.” See Humphreys, above n 1, 739.

<sup>205</sup> See Department of Justice, Hong Kong SAR, *The Statement of Prosecution Policy and Practice-Code for Prosecutors* (Hong Kong, Hong Kong SAR Dept of Justice, 2004), [4.1]-[4.2] available at: <http://www.doj.gov.hk.hk/eng/public/pubsoppapcon.htm>. See also Humphreys, above n 1, 739-740.

<sup>206</sup> The prosecutor had delayed disclosure of DNA and other results that implicated a different person to the accused with the murder with which he had been charged. The importance of the prosecutorial role in disclosing

[prosecutorial] office are indeed profound. Just as the responsibilities of a prosecutor go beyond that of other barristers, so also do some of the powers invested in the office.”<sup>207</sup>

[1.4.1.5] The broad powers and wide discretion associated with the prosecutorial role have become increasingly appreciated. The prosecutor owes no enforceable duty of care to either a potential defendant<sup>208</sup> or, despite modern rhetoric and official guidelines, to a victim.<sup>209</sup> The extensive range of the powers held by the prosecuting lawyer in the criminal justice system across the criminal process is seldom appreciated. Some indication of the breadth of these powers was provided in *Nelles v Ontario*<sup>210</sup> by Lamer J of the Supreme Court of Canada:

Among the many powers of the prosecutor are the following: the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, the power of disclosure/non-disclosure of evidence before trial, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal...<sup>211</sup>

[1.4.1.6] Potas notes that the decisions of prosecutors are “integral to the way the criminal justice system is viewed by the community.”<sup>212</sup> The prosecutor acts as the “gatekeeper” of the system and their decisions are instrumental in determining which offences are charged and which victims of crime have access to justice. Potas concludes:

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relevant material, whether it helps or hinders the prosecution case, and the minister of justice dimensions of that function are considered in Chapters 5 and 6 of this Thesis.

<sup>207</sup> *Krieger v Law Society (Alberta)* (1997) 149 DLR (4<sup>th</sup>) 92 at 98 per MacKenzie J.

<sup>208</sup> See *Elguzouli-Daf v Commissioner of Police for the Metropolis & CPS* [1995] 1 All ER 833; *Grimwade v State of Victoria* (1997) 90 A Crim R 526 at 545-546; *Thacker v Crown Prosecution Service*, *The Times*, 29 December 1997 and *Cannon v Tahche* (2002) 5 VR 317 at 340-341.

<sup>209</sup> See *R v Tkachuk* (2001) 159 CCC (3d) 434; *R v DPP, ex parte C*, unreported, Divisional Court, No Co1450/99, 10 March 2000 and *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495. cf *R v DPP, ex parte C* [1995] 1 Cr App R 136 and *R v DPP, ex parte Joseph* [2001] Crim LR 489.

<sup>210</sup> [1989] 2 SCR 170.

<sup>211</sup> [1989] 2 SCR 170 at 192. See also Byrett and Osborne, above n 200, 15; Green and Zacharias, above n 15, 841-842 and Gourlie, W, “Role of the Prosecutor: Fair Minister of Justice with Firm Convictions” (1982) 16 UBC L Rev 295 at 301. Though an exhaustive review and consideration of the powers of the prosecuting lawyer is beyond the province of this Thesis, it is relevant to note that in addition to the powers listed by Lamer J one can also include: the potential involvement of the prosecutor in the police investigation prior to charge (though the extent of any such involvement will differ from jurisdiction to jurisdiction); the power to authorise the institution of criminal proceedings (in England most criminal offences of any gravity now require the consent of a prosecuting lawyer before charges can be preferred); the power to agree or oppose bail for a defendant, the power to dispense with a preliminary or committal hearing (in Australia through the use of an *ex officio* indictment and in England through the use of a voluntary bill of indictment or the “transfer” of a case of serious fraud or involving a young witness to a sexual or violent offence); the power to compel the attendance of witnesses (increasingly topical in relation to offences such as domestic violence); the power to at least make representations as to sentence (and in the United States it is often said that the prosecutor’s power extends to being in a position to virtually dictate what the final sentence will be, see *US v Roberts* (1989) 726 F Supp 1359 at 1365-1366, *US v Bushell* (1990) 729 F Supp 632 at 637 and Gerber, R, “On Dispensing Injustice” (2001) 43 Ariz L Rev 135 at 139); the power to seek the confiscation of a defendant’s assets that can amount to the millions of pounds or dollars; and the power to challenge an unduly lenient sentence.

<sup>212</sup> Potas, above n 20, 3.

Prosecutors hold the key to the door of the criminal trial process. Apart from the quite exceptional case of private prosecution<sup>213</sup> there is no trial unless the prosecutor initiates legal action against the accused. The prosecutor’s authority then, is of pivotal importance in the administration of criminal justice... In short, these decisions, in partnership with the laws that define crime and prescribe penalties, delineate the outer limits of the State’s right to stigmatise and punish offenders.<sup>214</sup>

[1.4.1.7] The prosecutor possesses a wide degree of discretion with respect to his or her functions throughout the entire criminal process.<sup>215</sup> Courts usually show by tradition “tremendous deference” to the Crown Prosecutor’s role.<sup>216</sup> It has been considered that as an issue of principle based on the doctrine of separation of powers as well as a matter of policy based on the efficiency of an adversarial system of criminal justice and the fact that the exercise of prosecutorial discretion is especially ill suited to judicial review that the judiciary should not meddle with the exercise of prosecutorial discretion.<sup>217</sup> “The principle of prosecutorial discretion,” as the Supreme Court of Canada concluded in *R v T (V)*,<sup>218</sup> “is an important precept in our criminal law and exists for good reason.”<sup>219</sup>

[1.4.1.8] The exercise of the prosecutor’s wide powers and discretion in a modern adversarial criminal process with various and competing pressures is anything but simple or straightforward. As Gillen J in 2000 in the Northern Irish case of *Re: Adams*<sup>220</sup> explained:

The function of the DPP is a complex one. It is not that of an adjudicator between two parties...Moreover, the DPP has to weigh and consider a number of disparate and at times even competing interests eg the general public interest at any particular time, the interest of the putative accused, the victim, the supplier of information such as an informant, the various disinterested and interested witnesses. It is a complex and almost unique function. I consider that Parliament has invested him with the discretion to weigh up those disparate and often competing interests and then make a decision.<sup>221</sup>

[1.4.1.9] Lord Carswell CJ, delivering the judgment of the Court of Appeal endorsed in “apposite terms”<sup>222</sup> these observations in describing the difficult position of the DPP.

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<sup>213</sup> The private prosecutor, though crucial in the administration of criminal justice in the 1700s and early 1800s, was supplemented and eventually replaced by “public” prosecutors in the second half of the 1800s with the establishment of the police. See further the discussion in Part 7 of Chapter 2.

<sup>214</sup> Potas, I, “Prosecution Discretion” in Potas, above n 20, 35 at 37.

<sup>215</sup> See, for example, Krug, above n 16, 643

<sup>216</sup> MacNair, above n 41, 263.

<sup>217</sup> See, for example, *Imbler v Patchman* (1976) 424 US 409 and *R v Power* (1994) 89 CCC (3d) 1 at 13-20 per L’Heureux-Dubé J. See further the discussion in Part 4 of Chapter 10.

<sup>218</sup> [1992] 1 SCR 749 and (1992) 71 CCC (3d) 32.

<sup>219</sup> [1992] 1 SCR 749 at 762.

<sup>220</sup> *Re: Adams*; unreported, Queens Bench Division of Northern Ireland, 7 June 2000, Transcript (at first instance) and unreported, Court of Appeal of Northern Ireland, 12 December 2001, Transcript (on appeal).

<sup>221</sup> Transcript, Queen’s Bench Division, 27.

<sup>222</sup> Transcript, Court of Appeal, 26.

#### Part 4(2): Principled Importance: the Rationale of the Minister of Justice Role

[1.4.2.1] Various rationales have been identified for the prosecutorial role of a minister of justice. Dal Pont identifies two main reasons for the prosecutor’s duty of fairness and impartiality. The first is that, unlike other lawyers, there is theoretically no conflict between the prosecutor’s duty as a minister of justice to the court and the duty to the “client” – the State. Dal Pont asserts, “The proper administration of justice serves the interests of both.”<sup>223</sup> The purpose of the adversarial criminal trial is “an unending, uncompromising search for the truth; its purpose being as much the acquittal of the innocent as it is the conviction of the guilty.”<sup>224</sup> The prosecutor is a servant of justice rather than of the State.<sup>225</sup> The notion of the prosecutor as a minister of justice means that the State “wins” whenever justice is accorded in its courts, whatever the outcome. This principle was described in “grand language”<sup>226</sup> by Brennan J, delivering the unanimous opinion of the United States Supreme Court in 1963 in *Brady v Maryland*:<sup>227</sup>

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ‘The United States wins its point whenever justice is done to the citizens in its courts.’ A prosecutor that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.<sup>228</sup>

[1.4.2.2] The second reason identified by Dal Pont for the minister of justice role is that “in the eyes of the jury, the prosecutor’s status as the state may give her or his words a stamp of integrity and fairness.”<sup>229</sup> Unlike defence counsel “a prosecutor is likely to be seen by the jury as an authority figure whose opinion carries considerable weight.”<sup>230</sup> Prosecution counsel represents “the guardian of law and order and as such he or she has a greater potential to influence the jury than counsel for the defence.”<sup>231</sup> As Cory J explained in *R v Logiacco*:<sup>232</sup>

... the role of the Crown Attorney in the administration of justice is of critical importance to the courts and the community. The Crown prosecutor must proceed courageously in the face of threats and attempts at intimidation... He must be of absolute integrity, above all suspicion of unfair compromise or favouritism. The Crown prosecutor must be a symbol of fairness, prompt to make all reasonable disclosure and yet scrupulous in

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<sup>223</sup> Dal Pont, above n 173, 18.2 at [18.14].

<sup>224</sup> Shapray, above n 21, 126.

<sup>225</sup> See, for example, Byrett and Osborne, above n 200, 18 and Gourlie, above n 211, 300.

<sup>226</sup> Burke, above n 48, 482.

<sup>227</sup> (1963) 373 US 83.

<sup>228</sup> (1963) 373 US 83 at 87-88.

<sup>229</sup> Dal Pont, above n 173, 18.3 at [18.14]. See also *R v Alister* (1984) 154 CLR 404 at 429-430 per Murphy J.

<sup>230</sup> *State v Bujnowski* (1987) 130 NH 1 at 4.

<sup>231</sup> *R v B (RB)* (2001) 152 CCC (3d) 437 at 443 per Donald JA.

<sup>232</sup> (1984) 11 CCC (3d) 374.



attention to the welfare and safety of witnesses. Much is expected of the Crown prosecutor by the courts. The community looks upon the Crown prosecutor as a symbol of authority and as a spokesman for the community in criminal matters. In the vast majority of cases the trust of the public is well placed. Generally, the agents of the Crown carry out their duties in an exemplary manner. They personify the virtues required of their office and they perform their onerous obligations in a dedicated and skilful manner that reflects great credit on their profession and office...<sup>233</sup>

[1.4.2.3] A third rationale for the minister of justice role lies in the fact, as already noted, that prosecution counsel represents not just the State but the vast powers of the State. It is often argued that, in order to ensure the position of the accused is protected, the State’s powers and position are tempered by the prosecutorial role as a minister of justice. The prosecutor stands between the State and the individual.<sup>234</sup> Accordingly, one of the main rationales advanced for the minister of justice role is to help protect the accused from the powers of the State. As Judge Corrigan, when a Los Angeles prosecutor explained:

The first, best and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defence counsel, trial judge or appellate jurist, but in the integrity of the prosecutor...The prosecutor does not represent the victim of a crime, the police or any individual. Instead, the prosecutor represents society as a whole.<sup>235</sup>

[1.4.2.4] Binnie J in *R v Regan*<sup>236</sup> provides a similar rationale:

The duty of a Crown Attorney to respect his or her ‘Minister of Justice’ obligations of objectivity and independence is no less fundamental. It is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system and easily satisfies the criteria [for the principle of fundamental justice].<sup>237</sup>

[1.4.2.5] Some prosecutors might assert that it is for defence counsel and not for them to protect the rights of the accused.<sup>238</sup> As Hoeffel argues, “Isn’t the whole idea of becoming a prosecutor to put the bad guys behind bars and keep the public safe?”<sup>239</sup> Yet the conception of the prosecutor as a minister of justice in this context has widespread support,<sup>240</sup> not least from some prosecution lawyers themselves.<sup>241</sup> Even historical

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<sup>233</sup> (1984) 11 CCC (3d) 374 at 378-379. See also *Hall v United States* (1969) 419 F (2d) 582 at 583-584.

<sup>234</sup> Criminal Justice Review Group, *Review of the Criminal Justice Process in Northern Ireland* (Belfast, Northern Ireland Office, 2000) p 51 at [4.4].

<sup>235</sup> Corrigan, C, “On Prosecutorial Ethics” (1986) 13 Hastings Const LQ 537.

<sup>236</sup> (2002) 161 CCC 3d 97.

<sup>237</sup> (2002) 161 CCC 3d 97 at 157-158.

<sup>238</sup> Hoeffel, above n 45, 1141-1142.

<sup>239</sup> *Ibid*, 1141.

<sup>240</sup> See, for example, Dandurand, Y, “The Role of Prosecutors in Promoting and Strengthening the Rule of Law” (2007) 47 Crime, Law Sco Change 247-259.

<sup>241</sup> See, for example, Cowdrey, N, Hancock, B, and Myjer, E, *Human Rights Manual for Prosecutors* (The Hague, International Association of Prosecutors, 2003) p 1; Cowdrey, N, “Human Rights and the Prosecutor – Setting the Scene,” Keynote Address delivered at the International Association of Prosecutors Annual Conference, Cape Town, 4 September 2000, available at: <http://www.odpp.nsw.gov.au/speeches/IAP202000%20-%20Human%20Rights%20and%20the%20Prosecutor.htm> and Angelini, above n 5.



prosecutors can be found acting at odds with the historical perception of their role and conducting the prosecution case with moderation and being at pains to ensure the fair trial of the accused.<sup>242</sup>

[1.4.2.6] Nicholas Cowdrey QC, the New South Wales Director of Public Prosecutors, when asked the three greatest qualities of his office replied, “Independence, independence and independence.”<sup>243</sup> There is no doubt that the notion of “independence” has prominently featured in the formulation of the prosecutorial role. “The quintessential rationale for the establishment of an office of [the] DPP in western jurisdictions has been to provide an independent authority to perform the range of functions involved in prosecution.”<sup>244</sup> The concept of prosecutorial independence, however, is open to different meanings and is capable of referring to “independence” from any one of a range of parties that may play a role within the criminal process.<sup>245</sup>

[1.4.2.7] However, in its simplest terms the rationale of the minister of justice role is that it is a vital part of the right of all accused to a fair trial. “The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.”<sup>246</sup> It is the “birthright” of “every citizen”<sup>247</sup> and is “a principle that permeates the common law.”<sup>248</sup> “The right to a fair trial,” as Grosman notes, “is the single most sacred ideal in our criminal justice system, yet it remains largely amorphous and ill defined.”<sup>249</sup> Nevertheless, despite this fact, the overriding prosecutorial duty to act as a minister of justice and not as a partisan advocate, as noted by Chief Justice Spigelman extra-curially, “lies at the heart of what is required” for a fair trial.<sup>250</sup> Indeed, the decision of the Privy Council in *R v Randall*<sup>251</sup> makes it clear that the prosecutorial role must be seen as a basic

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<sup>242</sup> See, for example, *R v Sparks & Campbell*, *Hobart Town Courier*, 4 August 1843, p 4; *Hobart Town Advertiser*, 28 July 1843 and *Colonial Times*, 1 August 1843, p 3 (see further the discussion in Part 3 of Chapter 3 at [3.3.6]-[3.3.7]) and *R v Nixon*, *Colonial Times*, 7 February 1857, p 2-3 and *Hobart Town Mercury*, 6 February 1857, p 2-3 and 9 February, 1857, p 3 (see further the discussion in Part 6 of Chapters 3 at [3.6.5]).

<sup>243</sup> Cowdrey, N, “Hot Seat or Siberia” [1995] *Jour NSW Bas Assoc* 5. See also Byrett and Osborne, above n 200, 93.

<sup>244</sup> *Ibid.*

<sup>245</sup> See, for example, *Ibid.*, 95-96 and Green and Zacharias, above n 15, 860-861. This includes the police or investigative arm of the process, politicians, the executive arm of government, victims and the judiciary. While the notion of prosecutorial “independence” in Australia was seen as “political” independence in removing the prosecutorial role from government and the political process (see Plehwe, R, “The Attorney-General and Cabinet” (1980) 11 *Fed L Rev* 12) in England it was taken to be independence from the police in the initiation and conduct of prosecutions. See Rozenes, above n 19, 5; Bugg (1999), above n 186 and Bugg, above n 26.

<sup>246</sup> *R v Dietrich* (1992) 177 CLR 292 at 335 per Deane J. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29 per Mason CJ, 56 per Deane J, 72 per Toohey J and 75 per Gaudron J and *R v McKinney* (1991) 171 CLR 468 at 478.

<sup>247</sup> *R v Bentley* [2001] 1 Cr App R 21 at [68]

<sup>248</sup> Spigelman, J, “The Trust Can Cost Too Much: The Principle of a Fair Trial” (2004) 78 ALJ 29.

<sup>249</sup> Grossman, B, “Disclosure by the Prosecution: Reconciling Duty and Discretion” (1988) 30 *Crim LQ* 346.

<sup>250</sup> Spigelman, J, “Public Confidence in the Administration of Criminal Justice,” Opening Address, The Australian Association of Crown Prosecutors Conference, Sydney, 5 July 2007, (2007) 19 *Current Issues in Criminal Justice*, 219 at 221.

<sup>251</sup> [2002] 1 WLR 2237.

tenet of the fairness of the whole criminal process. Lord Bingham in *Randall* observed that the “one over-riding requirement” of any criminal trial is that any defendant accused of a crime received a fair trial.<sup>252</sup> A number of rules have developed to ensure the fairness of a trial. Those rules are not to be regarded as the “rules of a game” but rather represented “certain basic rules” designed to safeguard the fairness of any criminal trial.<sup>253</sup> One of those rules according to Lord Bingham is the premise that, “The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice.”<sup>254</sup> It is in this context that one can, perhaps, best understand the justification for the minister of justice role as the “silver thread” of the web of the criminal law.<sup>255</sup>

[1.4.2.8] The various arguments of principle that have been raised to support the minister of justice role are powerful. These arguments further demonstrate why the exercise of the prosecutorial role is no idle question and raises important issues deserving of scrutiny. Despite the various rationales that have been offered for the minister of justice role, notably that it is essential for a fair trial, it is my argument that none of these factors necessarily dictate that this model should always define the prosecutorial role. In particular it can be argued that the right to a fair trial doesn’t compel the universal adoption by the prosecutor of a minister of justice role. The notion of what constitutes a fair and proper trial does not remain static or fixed and has always been the subject of change and development.<sup>256</sup> It must also not be forgotten that “a criminal trial is not for the squeamish... the adversary system is alive and well.”<sup>257</sup> It may be opportune and even overdue to question whether the prosecutorial role needs refinement or reevaluation. This Thesis will argue that the prosecuting lawyer need not always be cast as the disinterested minister of justice. Rather it is suggested that it is appropriate for the prosecutor within a modern adversarial criminal process, at least with respect to some functions, to play a vigorous and robust part in the proceedings whilst still being “fair” and not engaging in improper or unethical conduct.<sup>258</sup>

## Part 5: Overview of Thesis

[1.5.1] This Thesis begins by tracing the development of the Minister of Justice role in Australia and England. It then considers how this role has played out in relation to two important prosecutorial duties: disclosure and the calling of witnesses at trial. It then notes that the concept of the “prosecutor” that is adopted for this Thesis is that of the prosecuting lawyer in the higher courts and that the conduct and management of summary prosecutions is largely beyond the scope of this Thesis.

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<sup>252</sup> [2002] 1 WLR 2237 at 2241.

<sup>253</sup> [2002] 1 WLR 2237 at 2243.

<sup>254</sup> [2002] 1 WLR 2237 at 2241.

<sup>255</sup> In *Randall* for example, prosecution counsel had strayed from this role and had “conducted himself as no minister of justice should” [2002] 1 WLR 2237 at 2251.

<sup>256</sup> *State v O'Donoghue* [1976] 1 IR 325 at 350.

<sup>257</sup> *R v Kizon* (1985) 18 A Crim R 59 at 64.

<sup>258</sup> This is a professional requirement on all lawyers, see further Chapter 2, n 74.

[1.5.2] Chapter 2 discusses how the minister of justice role emerged in England in the early 1800s. The concept did not develop in a vacuum and is explicable as part of a wider movement in the newly adversarial process of England in the early 1800s to level the uneven playing field that existed at this time between the prosecution and the defence. It is suggested that this rationale of the minister of justice role has implications for the modern prosecutorial role. Though the English notion of the prosecutor as a minister of justice<sup>259</sup> might have been expected to apply unchanged in Australia, it is shown<sup>260</sup> in Chapter 3 that in practice the concept was often applied in the first half of the 1800s in Australia in a rhetorical sense as opposed to reality. On occasion it was followed, regardless of the nature of the crime or the social standing of the accused, but in practice it was often deployed in favour of respectable defendants. It is suggested that this prosecutorial restraint was not so much the product of the minister of justice concept as class bias. As prosecution counsel declared in *R v Bingle and Ware*,<sup>261</sup> “Many of the witnesses were gentlemen, and if they [the jury] had any feeling in the case it must be in favour of the prisoners, who were gentlemen.”<sup>262</sup> Chapter 3 further discusses how defendants such as bushrangers, convicts, Aborigines and sexual and political offenders were often zealously prosecuted as “enemies of society.” This is explicable by the fear factor that existed where such offenders were regarded as posing a very real threat to the tenuous stability of early colonial society. However, as Australia was transformed by the 1850s from a convict colony seemingly beset by potential perils into an orderly “normal” society, the fear factor receded and the minister of justice role was applied in both rhetoric and reality, even to crimes “beyond the pale.”<sup>263</sup>

[1.5.3] Chapter 4 discusses how the minister of justice role has not only been confirmed in a modern context in both Australia and England, but that this role has been extended in Australia to the extent that it potentially emasculates the adversarial nature of the criminal trial and gives rise to the real risk of supine prosecutors who are little more than disinterested spectators. It is crucial that the prosecutor has the ability to undertake his or her responsibilities effectively in an adversarial criminal system with a proper part to play in seeking the conviction of the accused. However, “the prosecutor is left with an ongoing schizophrenia, acting simultaneously as an advocate and a minister of justice.”<sup>264</sup> This inherent tension has never been satisfactorily resolved and, despite the view of

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<sup>259</sup> See *R v Thursfield* (1838) 8 Car & P 269, *R v Berens* (1865) 4 F & F 842, *R v Holchester* (1865) 10 Cox CC 227-228 and *R v Puddick* (1865) 4 F & F 497.

<sup>260</sup> There are no judicial pronouncements on the issue and it is from the declarations and practices of prosecutors themselves, notably at trial, that the early exercise of the prosecutorial role in Australia can be most accurately assessed. See further Part 2 of Chapter 3 for a description of the methodology that was employed in researching the historical Australian part of this Thesis.

<sup>261</sup> [1837] NSWSupC 25 (*Sydney Herald*, 15 May 1837).

<sup>262</sup> *Sydney Herald*, 15 May 1837. See further the discussion in Part 4 of Chapter 3, notably at [3.4.8].

<sup>263</sup> See, for example, *R v Nixon*, *Colonial Times*, 7 February 1857, p 2-3 and *Hobart Town Mercury*, 6 February 1857, p 2-3 and 9 February, 1857, p 3 (see the discussion in Part 6 of Chapters 3 at [3.6.5]) and *R v Griffiths*, *Hobart Mercury*, 25 and 26 October 1865 (see the discussion in Part 6 of Chapter 3 at [3.6.6]). See further the discussion in Part 6 of Chapter 3.

<sup>264</sup> Melilli, above n 12, 698.

some scholars to the contrary, it is argued in Chapter 4 that it is a “pipe dream”<sup>265</sup> to expect that the modern prosecutor can simultaneously perform both roles.

[1.5.4] This tension is manifest in the disclosure of relevant material to the defence by the prosecution.<sup>266</sup> Chapter 5 traces the development of the prosecution’s modern duty of disclosure. The prosecutorial role in respect of disclosure has undergone a complete transformation from the initial position where the prosecution was under no obligation in this area and was free to resort to “trial by ambush,” to the “Old Boys Act” where the prosecution was required to divulge its evidence in a case tried on indictment (though not summarily) but the provision of “relevant” unused material in its possession was left to prosecution counsel as a “gentleman” to resolve informally with defence counsel, to the modern insistence in England and later Australia for full and frank prosecution disclosure of any “relevant” material. Both the “trial by ambush” and the “Old Boys Act” systems can be criticised as resulting in many wrongful convictions due to the non-disclosure of significant material. Despite problems of principle and practice in dealing with disclosure, the “golden rule” is now one of full disclosure of any relevant material.<sup>267</sup> The overarching rationale of this duty is the notion of the prosecutor acting as the candid minister of justice. Chapter 6 considers in detail the major problems of both principle and practice that have emerged, notably in England, with respect to the prosecution’s duty of disclosure and asks whether a fair but workable system of disclosure can be devised. The assumption that the prosecutor, even if acting as the most ethical minister of justice will, within an adversarial criminal justice process, faithfully reveals material helpful to the defence is “questionable,”<sup>268</sup> if not “virtually impossible.”<sup>269</sup> Though the difficulties are considerable, nevertheless, suggestions can be made for the framework of a system of disclosure that is effective, efficient and fair to the accused.<sup>270</sup>

[1.5.5] Chapter 7 notes that the tension in the dual roles of minister of justice and adversarial advocate is also manifest in both the inconsistent historical and modern cases dealing with the prosecution’s choice of witnesses at trial. Chapter 7 considers the historical development of the law. Some historical decisions emphasised the minister of justice dimension of the prosecutor’s task and insisted that the prosecutor’s duty was to call all material witnesses, regardless of whether they helped or hindered the prosecution case. This duty is explicable given the inability of the typical accused in the 1800s to prepare his or her defence and secure and arrange the attendance of the witnesses who might support his or her case. However, other historical cases recognised the adversarial dimension of the prosecutor’s task and conferred a broad discretion in the prosecution’s choice of witnesses. The freedom to call only the witnesses that supported the

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<sup>265</sup> Hoeffel, above n 45, 1141-1142.

<sup>266</sup> See, for example, Burke, above n 48, 494-498 and Givelber, D, “Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent” (1997) 49 Rutgers L Rev 1317 at 1375. See further the discussion in Parts 3 and 4 of Chapter 6.

<sup>267</sup> *R v H* [2004] 2 AC 134 at 147.

<sup>268</sup> Burke, above n 48, 494. See also Weeks, J, “No Wrong Without a Remedy: the Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence” (1997) 22 Okla Uni L Rev 833 at 870.

<sup>269</sup> Hoeffel, above n 45, 1136.

<sup>270</sup> This is notably achieved by a system of “prophylactic open file” disclosure by the prosecution, see Burke, above n 48, 481. See further the discussion in Part 9 of Chapter 6.

prosecution case may be attributable to the increasingly lawyer-driven, adversarial nature of the criminal process of the 1800s. Indeed, the minister of justice role was ultimately rejected and the adversarial role to call witnesses affirmed. Chapter 8 considers the modern development of the law in Australia and notes that from the early 1980s Australian cases have departed from the previously settled position and have invoked the prosecutor’s minister of justice role. Indeed, this principle has arguably been extended in Australia to the extent that the adversarial character of the criminal trial is threatened and the prosecution’s “discretion” to present its case as it may wish at trial is frustrated. It is argued that such cases do not have a secure foundation in precedent.

[1.5.6] Chapter 9 considers the modern development of law and practice in England. Though the minister of justice role has been given a new “lease of life” by some modern decisions, other recent English decisions, reflecting apparent present practice, have recognised a wider degree of prosecution discretion and appear to represent a return to the prosecutor’s “adversarial” role in this area. This trend reflects recent developments in criminal procedure, notably the formulation of the prosecution’s modern duty of disclosure and a comprehensive system of pre-trial management that enables the defence before trial to identify and secure the attendance of witnesses it may wish to call. It is argued in Chapter 10 that, as advanced by the Supreme Court of Canada in *R v Cook*,<sup>271</sup> such developments justify and support the prosecution’s adversarial role in calling witnesses. Once full disclosure has been made to the defence, it should be for the defence to call any witness discounted by the prosecution in its wide discretion. It is argued in Chapter 10 that there are no other arguments of policy or practice that preclude such a role. It is not the prosecution’s task to do the work of the defence.

[1.5.7] Chapter 11 argues that the “Canadian solution” strikes a fair and workable balance and should also be adopted in Australia. In other words the prosecutor must act as the candid minister of justice in relation to disclosure and furnish any relevant material to the defence but in relation to its choice of witnesses, once full disclosure has been made, the prosecution should be free to assume an adversarial approach and possess the broad discretion to only call those witnesses that it wishes in support of its case. It is timely to ask whether the minister of justice model has outlived its original rationale and whether it remains an appropriate guide for all of the many functions of the modern prosecutor. Whilst it is accepted that in some circumstances the minister of justice concept remains valid, it is suggested that in other circumstances the prosecutor should be free to assume a robust and “adversarial” role in the proceedings.

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<sup>271</sup> *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437.

# CHAPTER 2

## THE TRANSFORMATION OF THE PROSECUTING LAWYER'S ROLE IN ENGLAND: FROM "PARTISAN ZEALOT" TO "DEMI- GOD" OF MINISTER OF JUSTICE, NOT THE RESULT OF AN "IMMACULATE CONCEPTION"

*This Chapter traces the sometimes uneven development of the prosecutorial role as a minister of justice in England and considers the factors that apparently explain why this role emerged when it did. It is argued that the emergence of this role in the late 1700s and early 1800s is explicable by the transformation of the criminal trial at that time from an inquisitorial to an adversarial model and by the disadvantaged position of the accused in that process. It is suggested that the origin of the minister of justice in this distinctive climate raises implications for the modern application of such a prosecutorial role, namely how the prosecutor is able to reconcile the tension of the concurrent roles of both minister of justice and adversarial advocate and whether a prosecutorial role that emerged in the early 1800s is still valid in the very different circumstances of modern Australia and England.*

### Part 1: Introduction

"Some time between the trial of Sir Walter Raleigh [in 1603] and the unfolding of the 19<sup>th</sup> century, the modern view of the 'ideal' prosecutor was immaculately conceived by a criminal justice system which, by today's standards, represents the very epitome of inhumanity and injustice. There is no shortage of lofty judicial pronouncements describing the mythical 'ideal' prosecutor. What follows is a view of the prosecutor as a demi-god whose sole function is to assist the court in the furtherance of justice. The prosecutor is not a partisan zealot but rather a minister of justice..."<sup>1</sup>

[2.1.1] It was in these terms that Grossman explained the fundamental transformation that the prosecutorial role was to undergo in England from the "partisan zealot" of historical and popular perception to that of the lofty minister of justice devoted only to

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<sup>1</sup> Grossman, Ch 1, n 249, 347.

the pursuit of justice. This transformation was not the result, as Grossman states – in academic jest, of some act of "immaculate conception." It is clear that the development of the prosecutorial duty of moderation and restraint did not emerge suddenly, in a legal and historical vacuum. It "did not come out of a clear blue sky."<sup>2</sup> Rather, it is my argument that the emergence of the prosecutorial role in England as a minister of justice is explicable by reference to the particular historical period and society in which it evolved. In particular, it is explicable by reference to the criminal justice system of the period which, though not the "epitome of inhumanity and injustice" by modern standards, as Grossman asserts, was at least strongly biased against the accused. As Stephen observes: "[a] criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted."<sup>3</sup>

[2.1.2] This Chapter traces the sometimes uneven development in England of the prosecutorial role as a minister of justice.<sup>4</sup> It is difficult to state a specific date at which the prosecutor's role as a minister of justice can be said to have been clearly formulated. Nevertheless, it is possible to identify a distinct period during which the principle – that the role of the prosecuting lawyer was different to that of any other advocate, emerged, or was at least confirmed. This period was toward the end of the 1700s and the early part of the 1800s. By the 1820s the concept of the proper role of the prosecutor as an impartial figure of restraint was widely accepted in English criminal practice. It is not coincidental that the emergence of the prosecutorial duty of restraint occurred during the same period as an adversarial system of criminal justice was taking hold in England. The development of the prosecutorial role as a minister of justice is also to be understood in light of the other characteristics of the criminal justice system of the period, most notably the disadvantaged position of the typical accused. It is my argument that the development of the prosecutorial duty of restraint was designed to "level the playing field" between the prosecution and the accused within the newly and increasingly adversarial criminal legal system of the period.

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<sup>2</sup> *R v Central Criminal Court, ex parte Director of Revenue and Customs Prosecutions* [2006] EWHC Admin 3064 at [37].

<sup>3</sup> Stephen, J, *A History of the Criminal Law of England (Vol 1)* (London, Macmillan and Co, 1883) p 397. Though this analogy was offered by Stephen to describe the typical criminal trial of the late 1600s his assessment remained equally apposite to describe the criminal process through until, at least, the end of the nineteenth century. See further the discussion in Part 5 of this Chapter.

<sup>4</sup> There exists a great deal of material to draw upon to study the historical development of the prosecutorial role in England. There are many sources of primary material such as formally reported cases, contemporary legal textbooks, journal articles and newspaper and other accounts (available both electronic and paper) of the criminal trials of the period which were typically reported at some length (ranging from the most sensational to even the routine). There is also a considerable volume of scholarly study of the English criminal process of the 1700s and 1800s, notably on the development of the adversarial system and the part played by lawyers in that process. The research undertaken in Chapter 2 for the historical development of the prosecutorial role in England employed all these resources. Given the other available sources and practical considerations (it would have been impossible to have looked at the report of every English criminal trial for the late 1700s and 1800s), I considered a selection of both the leading and routine trials of the period, with particular focus on the most historically significant period in the development of the prosecutorial role, namely the 1820s. The resources available to consider the historical development in the 1800s of the prosecutorial role in Australia are very different to the wealth of resources that exist to consider the similar historical development of the prosecutorial role in England. There is nothing approaching either the volume of available primary material or academic studies by scholars to rely upon to consider the Australian position as exists for the study of the English position. See further Part 2 of Chapter 3 for a description of the methodology employed in researching the historical Australian part of this Thesis.

[2.1.3] In summary, the development of the prosecutorial role of the modern prosecutor was initiated by two major factors: the emergence of the adversarial criminal trial and the powerless position of the accused in that trial. The origin of this prosecutorial role raises important questions as to the ramifications and rationale for the modern prosecutor’s continued strict adherence to the role of a minister of justice. Specifically it begs the following questions:

1. How is the prosecuting lawyer to discharge the role of an impartial minister of justice within an adversarial criminal framework?
2. Is it appropriate that the prosecutorial role that emerged within the particular context of English history in the early nineteenth century should still apply, essentially unchanged, in the very different conditions of modern England and Australia?

## **Part 2: The Prosecutor’s Original Role: Tantamount to the “Worst Sort” of Murderer?**

The offices of Attorney and Solicitor-General<sup>5</sup> have been rocks upon which many aspiring Lawyers have made shipwreck of their virtue and human nature. Some of these Gentlemen have acted at the bar as if they thought themselves, by duty of their places, absolved from all the obligations of truth, honour and decency. But their names are upon record, and will be transmitted to after-ages with those characters of reproach and abhorrence that are due to the worst sort of murders, those that murder under the sanction of justice.<sup>6</sup>

[2.2.1] This extraordinary opinion was offered by Mallet in 1760 about the individuals who had previously performed the effective role of public prosecutors in England. The picture drawn by Mallet differs fundamentally from the prosecutorial role of the minister of justice as discussed in the last Chapter. Whether Mallet’s portrait of the role of the prosecuting lawyer accords entirely with the expectations and experiences of the period is debatable. Queen Elizabeth I, in one of the earliest expressions of the expectations of the prosecutor’s proper role, suggested that the Attorney-General was not to be regarded simply as a servant of the Crown whose role was to secure the conviction of an accused but rather he was “counsel not so much *pro domina Regina* as *pro domina Veritae*.”<sup>7</sup> In other words the prosecutor was a minister of truth, not a minister of the Crown. However, any notion that the prosecutor should function in this light does seem, as was noted by Mallet, to have fallen on deaf ears in the decades that followed. There is considerable evidence to indicate that many prosecuting lawyers of the 1600s and 1700s, notwithstanding Queen Elizabeth’s stricture, saw their role as one of a partisan advocate who demonstrated a “win at all costs” attitude.

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<sup>5</sup> As will be discussed in this Chapter these comments pertain to a period when most prosecutions were brought by private individuals and the Attorney-General and the Solicitor-General were the only “public” prosecutors.

<sup>6</sup> Mallett, D, *The Life of Francis Bacon* (London, A Millar, 1760), p xix quoted by Edwards, J, *The Law Officers of the Crown* (London, Sweet and Maxwell, 1964) p 56.

<sup>7</sup> Quoted by Rogers, Ch 1, n 170, 260.



[2.2.2] Edwards notes that a scrutiny of the "public" or "State" trials<sup>8</sup> of the 1600s reveals how the perception of the public prosecutor reached its "nadir."<sup>9</sup> Edwards comments that a study of the State Trials "provides an illuminating picture of the lengths to which individual law officers, always zealous and subservient to the interests of the Crown, were prepared to go in securing the conviction of the accused."<sup>10</sup> Even allowing for the robust nature of the language employed in accounts of this period, Edwards asserts that "it is difficult to find any substantial justification for the denigrating and bullying approach to the accused and their witnesses which was widely indulged in during this period by Crown prosecutors, whatever their status."<sup>11</sup> Scholars of the period shared this view. Emelyn in 1730 referred in disapproving terms to those prosecutors who had disregarded Queen Elizabeth's maxim:

...[and] who with rude and boisterous language abuse and revile the unfortunate Prisoner; who stick not to take all advantages of him, however hard and unjust, which either his ignorance, or the strict rigour of Law may give them, who by force or stratagem endeavour to disable him from making his Defence: who browbeat his witnesses as soon as they appear, tho' ever so willing to declare the whole truth; and do all they can to put them out of countenance, and confound them in delivering their evidence; as if it were their duty to convict all who are brought to trial, right or wrong, guilty or not guilty; and as if they, above all others, had a peculiar dispensation from the obligations of Truth and Justice. Such methods as these should be below men of honour, not to say men of conscience: yet in the perusal of this Work, such persons will too often arise to view; and I could wish for the credit of the Law, that that great oracle of it, the Lord Chief Justice Coke, had given less reason to be numbered among this sort.<sup>12</sup>

[2.2.3] Emelyn's singling out of Sir Edward Coke as warranting particular censure is significant. Coke, when Attorney General, during the course of the notorious trial of Sir Walter Raleigh for treason in 1603,<sup>13</sup> subjected Raleigh to the most extraordinary tirade of abuse. Coke proclaimed his intention to Raleigh "to make it appear to the world that there never lived a viler viper upon the face of the world than thou."<sup>14</sup> During the course of the trial Coke denounced Raleigh (amongst other things) as a "monster" with "an English face, but a Spanish heart;"<sup>15</sup> "the most vile and execrable traitor that ever lived;"<sup>16</sup> an "odious man" whose "name is hateful to all the Realm of England for thy pride"<sup>17</sup> and

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<sup>8</sup> The State Reports chronicle the trials brought for such "public" offences as treason and sedition. These were the rare type of offences that were inevitably prosecuted by and on behalf of the State. Though such trials may have been atypical of the period they are still instructive in showing the approach of the prosecuting lawyers of the time, see Edwards, above n 6, 56.

<sup>9</sup> *Ibid*, 54.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid*. See also Bennion, F, "The New Prosecution Arrangements: The Crown Prosecution Service" [1986] Crim LR 3 at 5.

<sup>12</sup> Emelyn, *Preface to State Trials* (2<sup>nd</sup> ed), p 3, quoted by Edwards, above n 6, 54.

<sup>13</sup> *R v Raleigh* (1603) 2 St Tr 1.

<sup>14</sup> Quoted by Grossman, Ch 1, n 249, 347, n 5.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid*.

“the foulest traitor that ever came to a bar.”<sup>18</sup> Even by the standards of the time Coke’s conduct at Raleigh’s trial was deplorable. It was as if to compensate for the paucity of the prosecution case that Coke felt compelled to resort to such “passionate invective”<sup>19</sup> as a substitute for any real evidence.<sup>20</sup> Coke’s “vituperation of Raleigh is an unparalleled example of forensic brutality.”<sup>21</sup> It is no coincidence that Coke is still singled out to this day as the example of the zealous prosecutor subordinating all else to the desire to secure the conviction of the accused.<sup>22</sup>

[2.2.4] *Raleigh* was by no means an unusual case during this period.<sup>23</sup> The case of *R v College*<sup>24</sup> was also distinguished by the zealous approach of prosecution counsel. The accused, while facing a capital charge of high treason, had been permitted to prepare certain papers to aid his defence. These were seized and viewed by prosecution counsel who then used their contents to manage their case and to avoid calling certain witnesses whom College could have cross-examined or contradicted. It is not for nothing that Stephen pronounces this as “one of the most wholly inexcusable transactions that ever occurred in an English court.”<sup>25</sup>

[2.2.5] Such zealous prosecutors were not confined to notorious trials of the Stuart period as *Raleigh* and *College*. Throughout the 1700s and well into the 1800s one finds examples in England of prosecution counsel assuming the mantle of the partisan advocate bent on securing the conviction of the accused.<sup>26</sup> A notable illustration is to be found in the trial in 1797 of *R v Knowles*.<sup>27</sup> In this case, the jury was treated to a display by the famed Mr.

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<sup>18</sup> *Ibid.*

<sup>19</sup> Stephen, H, “The Trial of Sir Walter Raleigh: A Lecture Delivered in Connection with the Raleigh Tercentenary Commemoration” (1919) 4<sup>th</sup> Series Vol 2 Transactions of the RHS 172 at 178.

<sup>20</sup> The trial was on any view a travesty. The only “evidence” against Raleigh was vague and manifestly unreliable hearsay. See Knight, A, *The Life of the Law: The People and Cases that have Shaped Our Society, from King Alfred to Rodney King* (New York, Oxford University Press, 1998) p 66-67. The case is still cited to this day as supporting the vital proposition of allowing an accused to confront his or her accuser, see *Ibid*, 69.

<sup>21</sup> H Stephen, above n 19, 185.

<sup>22</sup> See Grossman, Ch 1, n 249, 347, n 5; Edwards, above n 6, 55 and Turner, K, “The Role of Crown Counsel in Canadian Prosecutions” (1962) XL Can Bar Rev 439 at 442-443. Coke was later to be known in his capacities as Chief Justice and Member of Parliament for his distinguished contribution to the law and, ironically, given his conduct in *Raleigh*, “principal defender of the fair trial rights of Englishmen” (Knight, above n 20, 68) and author of the doctrine of judicial review.

<sup>23</sup> The zeal of prosecution counsel in the State Trials in confronting alleged political or religious offenders who challenged the Crown is comparable to the zeal later shown by counsel in Australia on occasion in the 1800s in prosecuting offenders who were similarly perceived as threatening the established social order. See, for example, the strong criticism of the prosecution in the Eureka Stockade treason trials in 1855, see Editorial, *The Age*, 27 February 1855, p 4. See further the discussion in Part 5(3) of Chapter 3.

<sup>24</sup> (1681) 8 St Tr 549.

<sup>25</sup> Stephen, above n 3, 406.

<sup>26</sup> See *R v Thomas & Elizabeth Bates*, Central Criminal Court, 15 October 1740 (highway robbery); *R v May*, Central Criminal Court, 15 October 1740, No 174001015-20 (forgery); *R v Carter*, Central Criminal Court, 16 January 1748 (murder); *R v Hogan*, Central Criminal Court, 11 January 1786, No 17860111-1 (murder); *R v Priddle*, Central Criminal Court, 18 April 1787, No T17870418-118 (perverting the course of justice) and *R v Hubbard & Ors*, Central Criminal Court, 29 March 1792, No 17920329-26 (murder) for examples of zealous prosecution counsel.

<sup>27</sup> Central Criminal Court, 11 January 1797, No T17970111-4.

Garrow<sup>28</sup> as prosecution counsel that was anything other than restrained. Knowles had been charged with obtaining money under false pretences through fraudulent claims of being able to obtain official pardons for convicted prisoners.<sup>29</sup> As this was only a misdemeanour Knowles would not have faced the death penalty if convicted. Undeterred by this fact Mr. Garrow opened the prosecution case to the jury in the following terms:

The prosecution which you are now called upon, as Jurymen, to decide, appears to me...to be one of the highest importance that can possibly come for consideration in the shape of a misdemeanour. It has been thought by those entrusted with some of the highest departments of the administration, to be their duty to submit to your protection a class of persons who can in no other way be protected, who are unable to protect themselves, and who appear to have been the objects of the most abandoned and profligate plunder that I think I have ever seen stated in any Court of Justice. You have collected...that the charge against the prisoner (and probably you will agree with me in thinking, if I prove the facts to you, and which can only subject him to the punishment of a misdemeanour, I own for one, I wish it was a higher offence against him)...and I am sure, when the charge is proved, you will be happy to protect those unhappy persons who are too often the prey of men in this situation.<sup>30</sup>

[2.2.6] This address was the subject of complaint by defence counsel, Mr. Knapp, who remarked that he had been "very much surprised" to hear Garrow, "as prosecutor for the public," outline his opinion about what should have been the appropriate sentence in the case.<sup>31</sup> Garrow, far from being abashed, saw fit to interrupt Knapp and confirmed that he had meant to say, "I wish it was such a case that he [the accused] could be hung for it."<sup>32</sup> Not only did this unseemly outburst dispel any lingering doubt that the jury might have held as to the strength of Garrow's views about the case, but it was indicative of the lack of restraint in which Garrow undertook the prosecution of the entire case.

[2.2.7] Though a lack of prosecutorial restraint may have been explicable in a case of misdemeanour such as *Knowles*<sup>33</sup> (where the accused was at least entitled to full legal

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<sup>28</sup> Garrow was one of the most renowned advocates, whether prosecuting or defending, of the period at the English criminal Bar, and was to play a significant part in the growth of an adversarial system of criminal justice. See further Beattie, J, "Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries" (1991) 9 Law & His Rev 221 at 236-247 and Landsman, S, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) 75 Cor L Rev 497 at 563-565 and Hostettler, J, *Fighting for Justice: The History and Origin of Adversary Trial* (Winchester, Waterside Press, 2006) p 59-115.

<sup>29</sup> Given the severity of the criminal justice system in general and of sentences in particular, official pardons were a valuable means of sparing many prisoners from either lengthy sentences or even the death penalty, see further Hay, D, "Property, Authority and the Criminal Law" in Hayes, D, *et al*, *Albion's Fatal Tree: Crime and Society in eighteenth-century England* (New York, Pantheon Books, 1977) 17 at 22-23, 23, n 1 and 43-49.

<sup>30</sup> *R v Knowles*, Central Criminal Court, 11 January 1797, T17970111-4.

<sup>31</sup> Indeed, a traditional aspect of the prosecutor's role as a minister of justice was that he or she played no role whatsoever in sentence and, certainly, did not urge a harsh or punitive sentence. This was the convention in both England (see May, Ch 1, n 176, 94 and Zellick, G, "The Role of Prosecuting Counsel in Sentencing" [1979] Crim LR 493) and Australia (see *R v MacNeil-Brown* [2008] VSCA 190 at [14] and Warner, K, *Sentencing in Tasmania* (2<sup>nd</sup> ed) (Sydney, Federation Press, 2002) p 25-26) until very recent times. Though modern practice has eroded this convention (see, for example, *Ibid*, 26, *R v Rumpf* [1988] VR 466 and Guideline 9.7.1.8 of the *Prosecution Policy and Guidelines* (Vic)), the prosecutor's role at sentence remains limited. See also Chapter 4, n 84 and n 87.

<sup>32</sup> *R v Knowles*, Central Criminal Court, 11 January 1797, T17970111-4.

<sup>33</sup> See also *R v Oliver*, Central Criminal Court, 26 October 1791, No T1791026-03; *R v Jacques*, Central Criminal Court, 10 July 1790, No T 17900710-1 (fraud); *R v Edwards*, Warwick Assizes (*The Times*, 5 August 1820) and *R*

representation), it was by no means confined to such cases. Even in cases of felony where the accused laboured at trial under the burden of being denied the same entitlement to full legal representation enjoyed by the prosecution,<sup>34</sup> prosecution counsel might still discard any notion of restraint and vigorously urge the conviction of the accused.<sup>35</sup> Even an assertion by prosecution counsel that his function was strictly objective and was purely to assist the court in arriving at the truth could ring hollow in practice. Mr. Garrow’s celebrated opening speech in 1806 as prosecution counsel in *R v Patch*<sup>36</sup> during a trial for murder is a leading example of this. Mr. Garrow professed that the jury should not expect him to “enter into any elaborate argument, or endeavour by any subtlety of reasoning” to seek the conviction of the accused.<sup>37</sup> His role was simply to assist and facilitate the jury’s understanding of the evidence and the jury would not be able to accuse him of “designedly stating one syllable to inflame or mislead you.”<sup>38</sup> However, the next portion of Mr. Garrow’s address belied any such assertion:

I shall proceed in stating the relative positions of these parties, a situation which, if the defendant be guilty of this murder places him in the condition of one of the worst men the history of mankind has ever presented us with; a man who has deliberately sought the occasion of bringing his best benefactor and friend into the toils of mischief, and there for the determined purpose of destroying him, taking away that life which had been for a considerable time spent for his benefit. A case which if it is not indeed petit treason<sup>39</sup> is next of kin to that crime, I believe amounting to petit treason...without being

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*v Wakefield & Wakefield* (*The Times*, 26 March 1827) (abducting an unmarried heiress). The rationale for the greater scope for robust prosecution advocacy in a misdemeanour was that it was a non-capital crime and the accused could be legally represented, see May, A, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill, University of North Carolina Press, 2003) p 103.

<sup>34</sup> It appears curious that in a felony where the accused might face the death penalty if convicted he or she was not entitled to legal representation yet in a misdemeanour, where the punishments upon conviction were far less severe and did not include the death penalty, the accused was entitled to full legal representation. The explanation for this anomalous situation was that misdemeanours often dealt with offences of a civil or regulatory nature and in essence were viewed as a civil suit and in such cases legal representation seems to have been thought necessary. See Langbein, J, *The Origins of Adversarial Criminal Trial* (Oxford, Oxford University Press, 2003) p 36-37 and May, above n 33, 22.

<sup>35</sup> See, for example, *R v Akles*, Central Criminal Court, 14 January 1784, No T17840114-80 (fraud of “some of the first families in the kingdom”). See also the cases cited above at n 26.

<sup>36</sup> See the transcript of the trial in Gurney, J, and Gurney, W, *The Trial of Richard Patch for the Wilful Murder of Isaac Blight* (London, M Gurney, 1806).

<sup>37</sup> *Ibid*, 7.

<sup>38</sup> *Ibid*, 9.

<sup>39</sup> Petit treason was a crime that was an aggravated form of murder. The crime involved the murder of a person to whom the offender owed some duty of subjection such as a wife killing her husband (but not vice versa) or a servant killing his or her master. Petit treason was considered even worse than normal murder as it was said to involve the betrayal of trust of a superior by a subordinate. It was to remain a distinct offence in England until 1828. The rationale for such a crime was that society rested on a framework in which each person had his or her appointed place and such murders were seen as threatening this framework of society. This notion of vigorous prosecution of defendants who could be perceived as a “threat to society” also emerges from some of the nineteenth century Australian cases showing similar prosecutorial zeal in confronting such defendants (as will be discussed in Part 5 of Chapter 3). Even a renowned defence advocate such as Garrow when prosecuting in *Patch* seems to have succumbed to such combative instincts. See his similar efforts in another case of “petit treason” in *R v Radbourne*, Central Criminal Court, 11 July 1787, No T17870711-1. See also *R v Benson* (*Sydney Gazette*, 27 January 1825).

very superstitious, I have persuaded myself that I see the directing hand of Providence to arrest guilt in its career, and to bring the guilty to punishment.<sup>40</sup>

[2.2.8] Mr. Garrow continued in this vein throughout his opening address. The effect of Garrow's speech was damning to the defence case.<sup>41</sup> It was not described as a "hanging speech"<sup>42</sup> for nothing. Cairns concludes that the effect of Garrow's opening address was "to make the result of the trial a foregone conclusion. Patch was on his way to the dissection table before a witness was sworn or a syllable of evidence heard."<sup>43</sup> However, Garrow's address proved controversial owing to what contemporary observers saw as its partisan nature interlaced, as it was, with melodrama, prejudicial comments, anecdotes and personal comments and opinions.<sup>44</sup> Indeed, Garrow's speech in *Patch* was still being cited over 30 odd years later in the debates preceding the *Prisoners Counsel Act* "as an anomaly requiring explanation."<sup>45</sup>

[2.2.9] The zealous approach of prosecution lawyers in cases such as *Raleigh*, *College* and *Patch* cast a long and baleful light over the perception of the prosecutor's role in the criminal process. This unflattering perception has persisted, as noted by Angiolini and others as described in the previous Chapter, to the present day.

### **Part 3: The Role Transformed: The Prosecutor as a "Demi God" of Truth and Justice**

[2.3.1] However, it is important not to overstate the influence of the prosecuting lawyer who conducted himself as the partisan advocate on the criminal process of the 1600s and 1700s. First, as the bulk of the criminal trials in the 1600s and 1700s were brought by private individuals, the impact upon the criminal process of the prosecution lawyer (or even the defence lawyer) was only limited. Lawyers, whether prosecuting or defending, were generally conspicuous by their absence. The accused in cases of felony had no right to be legally represented,<sup>46</sup> and the prosecution, although entitled to be legally represented, rarely saw fit to exercise this power except in quasi-political cases such as high treason. Indeed, the typical criminal trial had progressed little beyond the account given by Sir Thomas Smith in the mid-sixteenth century describing a seemingly typical

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<sup>40</sup> Gurney and Gurney, above n 36, 9-10.

<sup>41</sup> As a measure of its effectiveness Patch was convicted after the jury had deliberated for just ten minutes.

<sup>42</sup> May, above n 33, 103.

<sup>43</sup> Cairns, D, *Advocacy and the Making of the Adversarial Criminal Trial: 1800-1865* (Oxford, Clarendon Press, 1998) p 44. The mention of the "dissection table" is a reference to the gruesome practice of the day in which convicted murderers were not only hanged but their bodies were released for medical experimentation. This additional posthumous sentence was intended to add to the deterrent effect. See further Linebaugh, P, "The Tyneburn Riot Against the Surgeons" in Hay *et al*, above n 29, p 65-117.

<sup>44</sup> See Gurney and Gurney, above n 36 and Cairns (1998), above n 43, 41-43 (particularly 41, n 80).

<sup>45</sup> *Ibid*, 44.

<sup>46</sup> The rationale was that an honest accused was his or her best advocate and that legal representation "was not only unnecessary but positively harmful" (Beattie (1991), above n 28, 223). See also Hawkins, W, *A Treatise of Pleas of the Crown (Vol 2)* (London, E Nutt, 1721), p 400. The judge was supposed to act as counsel for the accused, see *R v Twyn* (1663) 4 St Tr 515 and Beattie, above n 28 (1991), 223. As late as 1832 one can still find the expression of this notion, see *R v Spillane* [1832] NSWSupC 32 (*Sydney Gazette*, 7 May 1832).

criminal trial of the period in the form of a lawyer-free “altercation” between citizen accuser and citizen accused in which the judge assumed the role of questioning the witnesses.<sup>47</sup> Langbein and other scholars have demonstrated that the typical criminal trial of the eighteenth century continued to remain essentially inquisitorial in format, and free of lawyers.<sup>48</sup>

[2.3.2] With the development of an adversarial, as opposed to an inquisitorial, criminal process in the late 1700s and early 1800s, and the growing presence and involvement of both prosecution and defence counsel in the criminal trial, the question of the appropriate role for prosecution counsel assumed real significance.<sup>49</sup>

[2.3.3] Secondly, the partisan approach of prosecution counsel in cases such as *Raleigh, College* and *Patch* was by no means universal during the 1600s and 1700s. Emelyn acknowledges that there were those Attorneys-General who paid more than lip service to Queen Elizabeth’s maxim, and who did seriously regard themselves as retained *pro Domina Veritae*, rather than *pro Domina Regina*, and were intent, not so much on convicting the accused, as upon discovering the truth.<sup>50</sup> Edwards makes a similar point.<sup>51</sup> May asserts that a scrutiny of the voluminous Old Bailey Session Papers<sup>52</sup> for the 1700s “tends on the whole”<sup>53</sup> to confirm that prosecution counsel of this period, in cases of felony at least, acted with restraint and leaned “rather largely to the side of mercy”<sup>54</sup> in opening their case to the jury.<sup>55</sup> It is clear from the Old Bailey Session Papers and other sources for the 1700s and early 1800s that many prosecutors did refrain from following the example of advocates such as Sir Edward Coke and Mr. Garrow, conducting the prosecution case at trial with scrupulous fairness, disavowing any notion that their role was simply to obtain the conviction of the accused.<sup>56</sup> It is instructive to look at the tone of

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<sup>47</sup> Smith, T, *De Republica Anglorum* (Book 2), p 114 quoted by Langbein, J, “The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors” (1999) 58 *Cam L Jour* 314 at 315. See also Cairns (1998), above n 43, 46.

<sup>48</sup> See Langbein (2003) above n 34; Langbein (1999), above n 47, 314-318; Langbein, J, “The Criminal Trial before the Lawyers (1978) 45 *Uni Chic L Rev* 263 at 272-300; Langbein, J, “Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources” (1983) 50 *Uni Chic L Rev* 1 at 123-134; Langbein, J, “The Historical Origins of the Privilege Against Self-Incrimination at Common Law” (1994) *Mich L Rev* 1047 at 1047-1062; Landsman, above n 28, 504-517 and Beattie (1991), above n 28, 221-226.

<sup>49</sup> See the sources identified above in n 48. See further Part 4 of this Chapter.

<sup>50</sup> Emelyn, above n 12, 3.

<sup>51</sup> Edwards, above n 6, 57-58.

<sup>52</sup> These are a collection of pamphlet accounts of the criminal trials held at the Central Criminal Court between 1670 and 1913 that are now available online at: <http://www.oldbaileyonline.org/>. For a discussion of the strengths and weaknesses of these records as a reliable source of reference, see Langbein (1978), above n 48, 267-272 and Langbein (1983), above n 48, 3-26.

<sup>53</sup> May, above n 33, 99.

<sup>54</sup> *Ibid.*

<sup>55</sup> See *Ibid.*, 99-105.

<sup>56</sup> See *R v Brice*, Central Criminal Court, 25 June 1761 (murder); *R v Bennett & Morris*, Central Criminal Court, 5 June 1782, No T 17820605-1 (murder); *R v Woolridge*, Central Criminal Court, 25 February 1784, No T17840225-96 (fraud); *R v Elliott*, Central Criminal Court, 11 July 1787, No T17870711-41 (wounding); *R v Dorrington*, Central Criminal Court, 10 September 1788, No T17880910-46 (rape); *R v Fonton*, Central Criminal Court, 15 July 1790, No T 17900915-37 (fraud by bank employee); *R v Wood & Brown*, Central Criminal Court, 8

restraint and the emphasis on the need for fair play appearing in the following loquacious<sup>57</sup> opening comments of Mr. Fielding, acting as lead prosecution counsel in 1785 in *R v Hardy*,<sup>58</sup> a theft trial:

Gentlemen of the jury, when I get up after my young friend, Mr. Garrow,<sup>59</sup> it must necessarily surprise you to see two of us to support this prosecution, and two of my learned friends appearing as Council [sic] for the prisoner, but Gentlemen, as you have already collected that the parties here are both foreigners,<sup>60</sup> you will expect from us a particular regard to our duty, you will expect from us a regulated conduct, that we on the part of the prosecution should be careful not even to enflame your passions, nor to aggravate the conduct of the prisoner at the bar: you will expect likewise from my learned friends on the other side, a regulated decorum in the cross-examination of the witnesses: in this Country Justice is always administered to the admiration of the world, in such a way to extort approbation from even the prisoners themselves.<sup>61</sup>

[2.3.4] Though there is an absence in the legal texts of the 1600s and 1700s of any statement of principle or practice about the discharge of the prosecutorial role,<sup>62</sup> it is clear that during the later part of the 1700s and the early part of the 1800s the notion of the prosecutor's role as the impartial minister of justice gained widespread acceptance. The example of Fielding in *Hardy* rather than the example of Garrow in *Knowles* or *Patch* came increasingly to represent the appropriate prosecutorial role at trial. Moderation and restraint by prosecution counsel were to be expected and valued. In contrast, Garrow's speech in *Patch* was still being cited in the parliamentary debates preceding the *Prisoners Counsel Act* over a quarter of a century after the trial "as the epitome of the dangerous power of prosecution counsel."<sup>63</sup>

[2.3.5] Just when this transformation in prosecutorial roles took place is not entirely clear and is the subject of academic debate.<sup>64</sup> The earliest comments in a reported case to bear

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December 1784, No T 17841208-2 (highway robbery); *R v Cunningham*, 11 January 1797, Central Criminal Court, No17970111-5 (murder) and *R v Shore*, Central Criminal Court, 14 January 1801, No T18010114-25 (murder of wife).

<sup>57</sup> Though the criminal trials of the 1700s and 1800s may have been remarkably swift by the standards of today such brevity did not extend to public expressions "in an age," as Travers notes, "when the least utterance of a statesman covered several pages of *The Times*, and when a Gladstone might orate for two hours on the Balkans or the state of the Anglican church" (Travers, R, *The Phantom Fenians of New South Wales* (Kenthurst, Kangaroo Press, 1986) p 121).

<sup>58</sup> Central Criminal Court, 23 February 1785, No T17850223-15.

<sup>59</sup> This was the same Mr. Garrow who was to appear for the prosecution several years hence with such effect in *R v Patch*. In *Hardy* Garrow had to be content with the role of junior counsel.

<sup>60</sup> The defendant and the complainant were both Frenchmen. The defendant was said to have stolen items from his employer, the *Compte de Mirabeau*.

<sup>61</sup> Central Criminal Court, 23 February 1785, No T17850223-15. Whether the administration of criminal justice in England at this time deserves the fulsome praise of Mr. Fielding is open to serious doubt as will be discussed further in Part 5 of this chapter.

<sup>62</sup> The comparative absence of lawyers from the typical English criminal trial of the 1600s and 1700s, with the notable exception of the State trials, might well explain this lack of scholarly reference.

<sup>63</sup> Cairns (1998), above n 43, 41.

<sup>64</sup> See further below n 92.

on this issue appear in 1838 in *R v Thursfield*.<sup>65</sup> The accused had been charged with the murder of her “male bastard child”<sup>66</sup> by suffocating it.<sup>67</sup> The prosecution counsel in his opening address declared his intention to present to the jury the whole of the facts of the case as they appeared to him from the depositions, whether those facts favoured the accused or went against her.<sup>68</sup> The prosecutor stated that he did not consider “himself as counsel for any particular side or party.”<sup>69</sup> He then opened and adduced in evidence the whole of the facts, from which it appeared that the child had not met a violent end but had rather been overlaid by accident.<sup>70</sup> The trial judge, Gurney B, expressed his approval of the prosecutor’s conduct. The prosecutor had “most accurately conceived his duty, which is to be assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party.”<sup>71</sup>

[2.3.6] This theme was advanced in subsequent cases. In the Irish case of *R v O’Connell*<sup>72</sup> in 1844 Crampton J rejected the notion that any advocate, whether prosecuting or defending, was to regard himself as a “mere mouthpiece”<sup>73</sup> of his client. The criminal court in the view of Crampton J was a “temple of justice” and all the parties in such proceedings, whether the respective advocates or the trial judge, were all “equally ministers in that temple” who all shared the same object which was “the attainment of justice” and that “justice should [only] be reached through the ascertainment of the truth.”<sup>74</sup> It is significant that the Attorney-General used similar language to describe his

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<sup>65</sup> (1838) 8 Car & P 269.

<sup>66</sup> Using the unsympathetic description in the report.

<sup>67</sup> (1838) 8 Car & P 269. This was an unfortunately common crime in the 1800s.

<sup>68</sup> This issue, as foreshadowed in Chapter 1, will be addressed at length in Chapters 7-9.

<sup>69</sup> (1838) 8 Car & P 269.

<sup>70</sup> This does rather beg the question why the accused had even been charged. However, in 1838 there was no modern style public prosecutor or investigating detectives and the police force was in its infancy.

<sup>71</sup> (1838) 8 Car & P 269-270.

<sup>72</sup> (1844) 7 Ir LR 260.

<sup>73</sup> (1844) 7 Ir LR 260 at 313.

<sup>74</sup> (1844) 7 Ir LR 260 at 312. Defence lawyers were not exempted by Crampton J from inclusion in the noble pursuit of seeking justice and truth. Crampton J’s sentiments as to the duties of the various actors in a criminal trial may strike a modern audience as rhetorical but the florid nature of his observations should not diminish their underlying force or persuasive value. Though certain modern practitioners of the “ends justifies the means” approach might disagree, it remains the case that any lawyer, whether prosecuting or defending or in civil proceedings, is an officer of the court and owes a paramount duty to assist the administration of justice rather than to advance solely the cause of their client, even if it might disadvantage the client’s interests. See *Rees v Sinclair* [1974] 1 NZLR 180 at 182-183, *Giannerelli v Wraith* (1988) 165 CLR 543 at 556 per Mason CJ, *Rondel v Worsley* [1967] 1 QB 443 at 502 per Lord Denning MR. (Court of Appeal) and [1969] 1 AC 191 at 227-228 per Lord Reid (House of Lords) for a modern reaffirmation of this proposition. This overriding duty to the administration of justice is widely reflected in various legal professional guidelines, see, for example, Rule 1 of the *Australian Bar Association Model Rules* available at: <http://www.austbar.asn.au/images/stories/PDFs/CurrentABAModelRules2002.pdf>; [302] of the *Code of Conduct of the Bar of England and Wales* available at:

[http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section1codeofconduct/partiii\\_fundamentalprinciples/](http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section1codeofconduct/partiii_fundamentalprinciples/); and Rule 3.3 (especially Comment [2]) of the *Model Rules of Professional Conduct* of the American Bar Association available at: [http://www.abanet.org/cpr/mrpc/rule\\_1\\_3.html](http://www.abanet.org/cpr/mrpc/rule_1_3.html). See further Martin, G, “The Role and Responsibility of the Defence Advocate” (1969) 12 Crim LQ 376, Ipp, Ch 1, n 173, 83 and Warren, M Chief Justice, “The Duty owed to the Court-Sometimes Forgotten,” Keynote Address to the Judicial



role when prosecuting in 1855 in the landmark trial of *R v Palmer*.<sup>75</sup> The Attorney explained in his opening address that the part he played in the trial was as "a minister of justice, with no interest and no desire save that justice shall be done impartially and righteously."<sup>76</sup> The trial judge, Lord Campbell CJ, echoed this description in his summing up to the jury. The Lord Chief Justice pronounced his "great satisfaction" at the course of the trial.<sup>77</sup> It had been a proper and equal contest. Palmer, unlike most defendants of the century, had ample resources to ensure that he had been well-represented by one of the most distinguished advocates of the English bar. The prosecution had been taken up by the government "so that justice may be duly administered"<sup>78</sup> and the Attorney-General as first law officer of the Crown had conducted the case in "his capacity as a minister of justice."<sup>79</sup>

[2.3.7] This view of the prosecutorial role was adopted in *R v Berens*<sup>80</sup> at the Central Criminal Court in 1865. The trial judge, Blackburn J, was concerned that the routine exercise by prosecution counsel of the right conferred by *Denman's Act*<sup>81</sup> to make a closing speech might inject an unwelcome adversarial tone into the prosecutor's role at trial and might injure the course of criminal justice. His Lordship stated that prosecution counsel must always bear in mind that he was not a "mere partisan" in the proceedings and ought to regard "himself really as part of the Court and acting in a quasi-judicial capacity... a kind of minister of justice."<sup>82</sup> This view was plainly not an isolated statement of the expectations of the prosecutorial role. The author of the report of *Berens* offered a lengthy commentary to the issues raised by that case. He cited the comments of Gurney on this point in *Thursfield* and remarked:

... it is quite clear that that most eminent and experienced Judge would have concurred with the view taken in the present case by Blackburn J and expressed in other cases by Crompton J, Mellor J, and other Judges,<sup>83</sup> and that it is not becoming in counsel for the

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Conference of Australia Colloquium, Melbourne, 9 October 2009, available at: <http://www.jca.asn.au/attachments/2009OriginalKeynoteAddress.pdf>. This principle differs from Lord Brougham's famous view of the lawyer's role, see Rogers, Ch 1, n 170, 269 and the discussion in Part 3 of Chapter 1 at [1.3.3].

<sup>75</sup> See Bennet, A, *The Queen v Palmer. Verbatim Report of The Trial of William Palmer at the Central Criminal Court, Old Bailey, London, May 14 and Following Days, 1856* (London, J Allen, 1856). See also Central Criminal Court, *Illustrated and Unabridged Edition of the Times Report of the Trial of William Palmer for poisoning John Parsons Cook at Rugeley: from the shorthand notes taken in the Central Criminal Court from day to day* (London, Ward & Lock, 1856). This is the case that is often cited as marking the culmination of the transformation of the English criminal justice system from an essentially inquisitorial process to an adversarial process, see Cairns (1998), above n 43, 163.

<sup>76</sup> Bennet, above n 75, 3.

<sup>77</sup> Central Criminal Court, above n 75, 166.

<sup>78</sup> *Ibid.* The government's involvement in bringing the prosecution in *Palmer* was relatively rare. For much of the 1800s it was customary for criminal proceedings to be brought privately by, or on behalf of, the victim.

<sup>79</sup> *Ibid.* Bennet quotes Lord Campbell as saying that the Attorney had conducted the case as "the Minister of Public Justice," see Bennet, above n 75, 307.

<sup>80</sup> (1865) 4 F & F 842.

<sup>81</sup> The *Criminal Procedure Act* 1865 is still widely known as "*Denman's Act*" to reflect Lord Denman's role in its passage.

<sup>82</sup> (1865) 4 F & F 842 at 856-857.

<sup>83</sup> No clue is provided by the report writer as to the citation or the source of the views expressed by these judges.

prosecution to struggle for a verdict as in a civil case, but to act rather as the minister of justice. And every one who has long watched the administration of criminal justice in this country, knows how honourably the Bar carry out the principle.<sup>84</sup>

[2.3.8] This proposition was confirmed the same year in *R v Puddick*<sup>85</sup> by Crompton J who shared the unease of Blackburn J at the prospect of prosecution counsel exercising their new power to make a closing speech:

I hope... that in the exercise of the privilege granted by the new Act to counsel for the prosecution of summing up the evidence, they will not cease to remember that counsel for the prosecution in such cases are to regard themselves as ministers of justice, and not to struggle for a conviction, as in a case at Nisi Prius – nor to be betrayed by feelings of professional rivalry – to regard the question at issue as one of professional superiority, and as a contest for skill and pre-eminence.<sup>86</sup>

[2.3.9] These comments are regarded as “the *locus classicus* on the role and approach of the prosecuting counsel.”<sup>87</sup> The fundamental transformation, in England at least, of prosecution counsel’s role from that of partisan advocate to that of judicious minister of justice would seem complete by 1865 when one notes the cumulative effect of cases such as *Thursfield*, *O’Connell*, *Berens* and *Puddick*.<sup>88</sup>

[2.3.10] However, it would appear that these cases, significant as they were, did not represent new law. Rather they gave the judicial seal of approval to what had already come to be a widely accepted proposition of English criminal procedure, namely the notion that the role of the prosecuting lawyer was not that of a mere advocate. The original source of this duty was not judicial pronouncement, but rather unwritten practice and professional etiquette.<sup>89</sup> Cairns observes that there was never an “authoritative expression” of the duty of prosecutorial restraint and that it “remained a matter of circuit etiquette, judicial discretion and the ‘good taste’ and ‘right feeling’ of counsel in individual cases.”<sup>90</sup> An English Member of Parliament in 1824 observed that the prosecution counsel “felt himself bound by an obligation stronger than the law – the obligation of honour and mercy – a deference to the court, and a regard to the opinion of his brother barristers” to offer only a bland and colourless opening statement of the case and to make no effort to aggravate it.<sup>91</sup>

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<sup>84</sup> (1865) 4 F & F 842 at 843, n (b). This confidence may well be misplaced. See the further discussion in this Chapter at Part 8, especially n 275 and n 286, which notes criminal trials marked by zealous prosecutors.

<sup>85</sup> (1865) 4 F & F 482 at 497.

<sup>86</sup> (1865) 4 F & F 482 at 499. See also *R v Holchester* (1865) 10 Cox CC 227 at 227-228.

<sup>87</sup> Murphy, P (ed), *Blackstone’s Criminal Practice 2005* (Oxford, Oxford University Press, 2005), p 1484 at [D13.3].

<sup>88</sup> See Sutherland, J, “Role of the Prosecutor: A Brief History” Criminal Lawyers Association Newsletter, June 1998, available at: [www.criminallawyers.ca/newslett/19-2/sutherland.htm](http://www.criminallawyers.ca/newslett/19-2/sutherland.htm).

<sup>89</sup> In this context the development of the duty of restraint in England is similar to how the duty was applied in Australia where it arose through the practices and pronouncements of prosecution counsel and was not formally judicially expressed in Australia until 1946. See further Part 2 of Chapter 3.

<sup>90</sup> Langbein (2003), above n 33, 44.

<sup>91</sup> Parliamentary Debates 11 (1824): 190, quoted by Beattie (1991), above n 28, 253. This remark was, ironically, made in the context of a parliamentary debate opposing the right of defence counsel to appear in criminal trials.

[2.3.11] Given the lack of scholarly and juridical reference to the prosecutorial role, it is not entirely clear when the transformation in prosecutorial roles took place; the precise origin of the notion that the prosecutor should function as a minister of justice is the subject of some debate.<sup>92</sup> Cairns considers that the earliest written statement defining the duty of restraint upon the prosecutor did not appear in a legal text until 1829<sup>93</sup> and asserts that the "duty on prosecution counsel in addressing the jury to restrain his advocacy within narrow limits" only emerged in "the first half of the nineteenth century."<sup>94</sup> May disagrees and suggests that the duty of prosecutorial restraint emerged well before 1829. She contends that, "[t]he unwritten etiquette of the criminal bar in this respect is quite clear by the 1780s and can almost certainly be traced back to an even earlier date."<sup>95</sup>

[2.3.12] It is, fortunately, unnecessary to resolve this debate.<sup>96</sup> Clearly by the 1820s and 1830s, as Cairns notes, "[t]he existence of such a duty of restraint was not doubted, though some remarked upon its recent origin."<sup>97</sup> Cairns' assessment is supported by the fact that by the 1820s contemporary observers were remarking on the fact that prosecution counsel acted with moderation and were not striving at all costs to secure the conviction of the accused. For example the French author, Cottu, in his review of the English legal process, was impressed in 1820 by the reserved character (especially when compared with France), not only of the English criminal trial but also of the prosecutor's address at trial:

The plaintiff's counsel then lays before the jury a summary of the case, which is nothing but a more detailed and circumstantial repetition of the indictment: guarding himself, however, from every sort of invective against the prisoner, and making no reflections on his depravity. Facts must speak, and the counsel is forbidden to excite feelings which must be called forth by them alone... We do not hear the prosecutor's counsel paint the prisoner as a monster of whom the earth ought to be that instant rid, and compare him to all the villains who have astonished the world by their enormities.<sup>98</sup>

[2.3.13] The strength of this convention and some rationale for its existence was provided by the Attorney-General in the course of his opening address to the jury in *R v Fauntleroy*<sup>99</sup> in 1824:

It was his duty to state to them, according to his instructions, the circumstances out of which the prosecution had originated, and afterwards to lay before them the evidence which he had to advance in support of that charge. The jury would feel that in the

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<sup>92</sup> See the barbed exchange between May (May, A, "Book Review" (2001) 19 Law & His Rev 676 and "Reply" (2002) 20 Law & His Rev 448) and Cairns (Cairns, D, "Correspondence" (2002) 20 Law & Rev Rev 445).

<sup>93</sup> Cairns (2002), above n 92, 446. See further below n 119.

<sup>94</sup> Cairns (1998), above n 43, 8.

<sup>95</sup> May (2001), above n 92, 677.

<sup>96</sup> Considering cases such as those above in n 56, May's argument does appear to have substance.

<sup>97</sup> *Ibid.*

<sup>98</sup> Cottu, M, *On the Administration of Criminal Justice in England; and the Spirit of the English Government* (London, Richards Stevens, 1822) p 87-89. See also Beattie (1991), above n 28, 253.

<sup>99</sup> See a transcript of the trial in Bleackley, H, *The Trial of Henry Flauntleroy and Other Famous Trials for Forgery* (London, William Hodge and Co, 1924).

discharge of the painful duty which had that day devolved upon him, he was bound to confine himself strictly and implicitly to a statement of the facts. In a criminal charge and especially in a criminal charge which involved the life of the party accused, and in which his counsel by the rules of English law had no right to address them on his behalf, they would feel that that if he were to make any observations calculated to excite in their minds improper resentment or prejudice – if he were to exaggerate or aggravate the facts on which the charge rested – he would be acting a part that would not only be unbecoming, but that would be highly reprehensible and improper. He should, therefore, confine himself to the facts which he had to offer to their consideration in support of the charge on which they were empanelled to decide.<sup>100</sup>

[2.3.14] There are many similar illustrations in England during this period of such prosecutorial restraint and solicitude for the accused. One observes a clear emphasis on the prosecutor’s role in aiding the administration of justice and promoting fairness, rather than in seeking the conviction of the accused. It is significant that in a “society radically divided between the rich and the poor, the powerful and the powerless”<sup>101</sup> (as England clearly was during this period), this prosecutorial role was not confined to defendants of “respectable” or high social standing,<sup>102</sup> but extended to all manner of defendants charged with all manner of crimes. This role was equally displayed in the prosecution of crimes that may have attracted a degree of sympathy,<sup>103</sup> as well as those of the utmost gravity committed in highly charged circumstances.<sup>104</sup> It is of particular significance, in light of the unhappy experience during the earlier State Trials and the experience in Australia during this period,<sup>105</sup> that even crimes “beyond the pale” that may have been perceived as challenging the established social or political order were also prosecuted in a restrained manner,<sup>106</sup> although this was not always the case.<sup>107</sup> The

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<sup>100</sup> *Ibid*, 74-75.

<sup>101</sup> Hay, above n 29, 39.

<sup>102</sup> See *R v Fonton*, Central Criminal Court, 15 July 1790, No T 17900915-37 (prosecution emphasised the accused’s respectable position at the Bank of England which he had allegedly defrauded); *R v Shore*, Central Criminal Court, 14 January 1801, No T18010114-25 (emphasis on the accused as a “man of repute and character” and “opulence” charged with the murder of his wife); *R v Macnamara*, Central Criminal Court, 20 April 1803, No T180304020-2 (great emphasis by prosecution counsel during a manslaughter trial arising from a fatal duel on the high standing as “gentlemen” of both the accused (a naval Captain) and the deceased (an army Colonel) and *R v Lambrecht & Ors*, Kingston Assizes, 2 April 1830 (*The Times*, 3 April 1830) (prosecution arising from a death in a duel).

<sup>103</sup> See *R v Curtis*, 15 September 1784, Central Criminal Court, No 1784040601-1 (infanticide) and *R v Thursfield* (1838) 8 Car & P 269 (infanticide).

<sup>104</sup> See *R v Patmore*, 25 February 1789, Central Criminal Court, No T 17890225-1 (the accused was alleged to have callously murdered his estranged wife by starvation and “hard usage”); *R v Corder* in 1826 (see the transcript of the trial in Curtis, J, *The Mysterious Murder of Maria Marten at Polstead in Suffolk* (reprint) (Geoffrey Bless, London, 1928) p 93-103 but especially 93) (a highly publicised murder); *R v Thurtell & Hunt*, Hertford Assizes, 6 January 1824 (*The Times*, 7 January 1824) (a sensational murder that attracted intense press coverage); *R v Goring*, Horsham Assizes, 24 March 1824 (*The Times*, 25 March 1824) (the prosecution of a 15 year old servant girl accused of the murder of her employer’s young daughter was undertaken in the “most dispassionate way” (*Ibid*)) and *R v Jones*, Central Criminal Court, 22 February 1828 (*The Times*, 23 February 1828) (the highly publicised trial for the brutal murder of a widow).

<sup>105</sup> Offenders in Australia who were regarded as “enemies of society” during this period were often prosecuted with zeal. See further the discussion in Part 5 of Chapter 3.

<sup>106</sup> See, for example, *R v Thistlewood & Ors* in 1820 (see the transcript of the trial in Wilkinson, G, *An Authentic History of the Cato-Street Conspiracy – with the trials at large* (London, Thomas Kelly, 1820) p 112-116) (at the trial for treason of several individuals who had plotted to murder the entire British Cabinet and overthrow the

observation of prosecution counsel, Sergeant Toddy, in 1824 in *R v Connoloy and Moran*<sup>108</sup> during a manslaughter trial that, "The persons concerned in the prosecution had no object in view but the attainment and furtherment of public justice and let the verdict of the jury be what it might, they would be satisfied,"<sup>109</sup> seems largely, though by no means universally, to represent the approach of prosecution counsel in England during this period.<sup>110</sup>

[2.3.15] However, it is notable that on occasion, even during the 1820s and beyond, prosecution counsel in England might succumb to adversarial temptation and assume the mantle of a partisan and unrestrained advocate.<sup>111</sup> The case of *R v Vaughan*<sup>112</sup> in 1828 provides a striking example of this. The accused had been charged with the peculiar offence of that period of "bodysnatching." It was alleged that Vaughan had unearthed two corpses from a graveyard in Yarmouth to be dissected for anatomical experiments.<sup>113</sup> The case had unsurprisingly, in light of the views of the period,<sup>114</sup> attracted "unprecedented" excitement throughout the town and the trial had to be moved to Norwich on account of the strong local feelings against the accused. One might have supposed that if any case called for prosecutorial restraint this would have been it. However, prosecution counsel,

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Government the Attorney-General stressed his role to state to the jury "calmly and fairly the facts... without any attempt at exaggeration on the one hand, or anything but a fair and candid narrative on the other, without any colouring whatsoever" (*Ibid*, 113)); *R v Riding*, Lancaster Assizes, 18 August 1823 (*The Times*, 23 August 1823) (the attempted murder of a Member of Parliament with a meat cleaver); *R v James & Pittaway*, Oxford Assizes (*The Times*, 8 August 1824) (the murder by two poachers of a gamekeeper); *R v Martin*, York Crown Court, 31 March 1829 (*The Times*, 2 April 1829) (burning down York Cathedral) and *R v McNaughton* (see the transcript of the trial in Bousfield, R, *Report of the Trial of Daniel McNaughton at the Central Criminal Court, Old Bailey, (on Friday 3 and Saturday 4 March 1843) for the wilful murder of Edward Drummond Esq.* (London, Henry Renshaw, 1843) (the Solicitor-General recited "calmly and dispassionately" (*Ibid*, 1) the Crown case at the famous murder trial arising from an assassination attempt of the British Prime Minister).

<sup>107</sup> See further Part 8 of this Chapter, especially below n 275.

<sup>108</sup> Hertford Assizes, 5 March 1824 (*The Times*, 6 March 1824).

<sup>109</sup> *Ibid*. Despite the Sergeant's restraint both accused were convicted and one was sentenced to be hanged.

<sup>110</sup> See also *R v Mead & Belt*, York Assizes, 21 July 1823 (*The Times*, 24 July 1823); *R v Overfield*, Shrewsbury Assizes, 19 March 1824 (*The Times*, 22 March 1824) (the murder by a father of his three month old son); *R v Garlick*, Central Criminal Court, 30 October 1826 (*The Times*, 31 October 1826) (theft of money by a postal worker at the GPO); *R v Franklin*, Hertford Assizes, 5 March 1830 (*The Times*, 6 March 1830) (prosecution counsel gave a strong character reference for the accused charged with the murder of his wife) and *R v McGowan*, Lancaster Assizes, 13 August 1831 (*The Times*, 16 August 1831) (a shooting during an industrial dispute by a watchman who was a former soldier) for other examples of prosecutorial restraint and fairness.

<sup>111</sup> See also *R v Burrows*, York Summer Assizes, 17 July 1823 (*The Times*, 21 July 1823) (attack and rape of the daughter of a respectable "gentleman"); *R v Wakefield & Wakefield* (*The Times*, 26 March 1827) (abduction and marriage of an underage heiress); *R v Hollinghead*, Huntingdon Assizes, 13 March 1830 (*The Times*, 8 March 1830) (bank robbery) and *R v Wallace* in 1841 (see the transcript of the trial in Central Criminal Court, *The Trials of Patrick Maxwell Stewart Wallace and Michael Shaw Stewart Wallace* (London, Williams & Son, 1841) p 11-12 (sinking a ship to defraud the insurer).

<sup>112</sup> *The Times*, 14 August 1828. See also Cairns (1998), above n 43, 39-40.

<sup>113</sup> Owing to the religious views of the period there was public unwillingness in England to release corpses for dissection and anatomy. A black market existed in providing corpses to meet the demands of medical education.

<sup>114</sup> It was believed that the soul of the deceased could not ascend to heaven if the body had been dissected or experimented upon. This is why defendants convicted of murder were sentenced not only to be hung but also for their bodies to be dissected and anatomised. See further Linebaugh, above n 43.

a Mr. Alderson, anticipating a defence of the scientific benefit of such experimentation and the practice in France of allowing such experimentation, saw fit to appeal to the jury’s prejudices in the following mawkish terms:

The jury would, no doubt, hear from the learned sergeant who conducted the defendant’s case, that it was necessary for the interests of science that this traffic should be continued, and philosophy and the authority of Paris would also be called in support of the practice. Thank heaven! however; the practice of Paris was not the practice of England. Every decent man would expect that when he had followed the body of his wife or daughter to the silent tomb, ‘where the wicked cease from troubling, and the weary are at rest’, their cold clay should there remain till the last trump[et] shall sound and the graves give up their dead.<sup>115</sup>

[2.3.16] The accused was, perhaps unsurprisingly, convicted.<sup>116</sup> However, it is notable that prosecution counsel in *Vaughan* was rebuked for his enthusiasm. The Press expressed its clear preference for a more restrained school of prosecution advocacy. The *Lancet* castigated Mr. Alderson for his “grovelling submissions to the vulgar prejudices of a jury of Norfolk yeomen.”<sup>117</sup> The *Examiner* accused him of “sycophancy to the rabble.”<sup>118</sup> It would appear that by 1828 the notion of “anything goes” in prosecution advocacy, even within an adversarial framework, was now frowned upon. This is reflected in the first apparent clear reference in a legal text to the scope of the prosecutor’s duty. Dickenson and Talfourd, in 1829, explained the prosecutor’s duty of restraint in all criminal cases; like the Attorney-General in *Flauntleroy*, provided some rationale for its existence:

When he [prosecution counsel] addresses the jury in a case of felony, he ought to confine himself to a simple detail of the facts he expects to prove: because the prisoner has no opportunity of laying his case before the jury by his counsel: and even the privilege of stating circumstances, however dryly, in such order and direction as may tend most directly to a particular conclusion is, of itself, no small advantage accorded to the prosecutor, and certainly should be exercised with great forbearance and caution...In cases of misdemeanour, the prosecuting counsel is not thus restricted, because here the defendant is allowed to make a real defence by his counsel, and, therefore, here the counsel for the prosecutor may not only state his facts, but reason upon them, and anticipate any line of defence which his opponent may probably adopt: but, even here, he should refrain from indulging in invective, and from appealing to the prejudices or passion of the jury: for it is neither in good taste nor in right feeling to struggle for a conviction, as an advocate in a civil case contends for a verdict.<sup>119</sup>

[2.3.17] By 1829 it is clear, in England at least, that the role of the prosecution advocate was not that of a mere advocate, even in advance of any apparent formal judicial expression to that effect. Whether the accused was charged with a felony or a

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<sup>115</sup> *The Times*, 14 August 1828.

<sup>116</sup> Though defence counsel, Sergeant Stokes, extolled the virtues of medical science and anatomy and pointedly asked the jury to stand aside from “the torrent of popular prejudice which might exist in some places” (*The Times*, 14 August 1828), the trial judge reminded the jury that their sole concern was whether the accused had removed either body from the graveyard and that any wider issues were the province of the legislature.

<sup>117</sup> *Lancet*, 23 August 1829, p 659 and 661; quoted by Cairns (1998), above n 43, 40, n 72.

<sup>118</sup> *Examiner*, 17 August 1829; quoted by Cairns (1998), above n 43, 40, n 72.

<sup>119</sup> Dickenson, W, and Talfourd, T, *A Practical Guide to Quarter Sessions and other Sessions of the Peace* (3<sup>rd</sup> ed) (London, Baldwin and Craddock, 1829) p 350.

misdemeanour, the prosecutor's role was what in due course would be described as that of a minister of justice. This is the prosecutorial role that has persisted to the present day, as will be discussed further in Chapter 4, in both England and Australia.

[2.3.18] What is ultimately significant is not so much precisely when the minister of justice role developed, but rather the vital fact that the emergence, or at least the confirmation, of the prosecutorial role as a minister of justice happened at about the same time as there was a gradual but fundamental shift in the operation of the criminal trial in England, from an informal and largely lawyer-free type inquisitorial hearing to something that resembles the lawyer-driven adversarial process of today. It is my argument that these two developments are not coincidental. The emergence of the minister of justice role is also explicable, as was suggested by the Attorney-General in *Flauntleroy*, and by Dickenson and Talfourd, by reference to the disadvantaged position of the accused at this time at trial, in particular his or her inability to be fully represented by counsel in cases of felony.

[2.3.19] The transformation of the prosecutorial role in the early 1800s raises two fundamental issues. First, the fact that the duty of prosecutorial restraint developed at about the same time as an adversarial criminal system was taking shape in England raises a crucial question: in a newly adversarial system, how was a prosecuting lawyer to reconcile the apparent tension between the dual roles of judicious, restrained minister of justice and that of an active advocate with a legitimate interest in seeking the conviction of the accused? The potential tension raised by these contrasting prosecutorial roles is, as will be discussed in more detail in Chapter 4, obvious. Secondly, the fact that the role of the prosecutor cannot be understood in isolation from the historical context in which it developed, namely the disadvantaged position of the accused within the criminal justice system of the early 1800s, raises the often overlooked question of whether a prosecutorial role that evolved in the particular climate of early nineteenth century England should still hold sway in the vastly changed circumstances of Australia and England in the 21<sup>st</sup> century.<sup>120</sup>

#### **Part 4: The Emergence of the Adversarial Criminal Trial**

[2.4.1] There is a common apprehension that the adversarial criminal trial, so familiar to all modern common law jurisdictions, enjoys a long and venerable historical legacy. However, as various scholars have demonstrated, such a view is misplaced.<sup>121</sup> Rather, as Langbein notes: "[t]he criminal lawyer and the complex procedures that have grown up to serve him and to contain him are historical upstarts."<sup>122</sup> The typical criminal trial of the 1600s and 1700s bore little similarity to the modern trial. Not only was the accused at a position of great disadvantage when compared with his or her modern counterpart in terms of the rights that they did (or rather did not) enjoy, but the typical trial of the 1600s and 1700s betrayed few of the adversarial trademarks that distinguish the modern

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<sup>120</sup> See further the discussion in Part 10 of Chapter 4.

<sup>121</sup> See Hostetter, J, *The Politics of Criminal Law Reform in the 19<sup>th</sup> Century* (Chichester, Barry Rose Law Publishing, 1992) p 58.

<sup>122</sup> Langbein (1978), above n 47, 316.

common law criminal trial. The presiding judge dominated the trial and dictated both the course of proceedings and the examination of the witnesses, and lawyers rarely appeared.<sup>123</sup> As McHugh J noted in 2001 in *R v Azzopardi*,<sup>124</sup> trials were relatively short, informal affairs<sup>125</sup> that “were effectively dialogues between judges, witnesses and accused persons.”<sup>126</sup> His Honour, drawing on Langbein’s work,<sup>127</sup> observed that until the regular appearance of counsel in the late eighteenth century, the common law criminal justice system, at least as it concerned felonies, was in substance an inquisitorial system.<sup>128</sup>

[2.4.2] The civil or inquisitorial shape of the criminal trial underwent a gradual but fundamental shift in the later part of the eighteenth century and the first part of the nineteenth century.<sup>129</sup> The presence at the trial of lawyers, from being a comparative novelty, steadily became a routine, though far from universal, feature of the criminal process.<sup>130</sup> It is clear that during the later part of the 1700s and the earlier part of the 1800s, the private prosecutors of the period increasingly chose to employ both the services of a solicitor to prepare the prosecution case for trial<sup>131</sup> and, crucially, to be represented by counsel at trial. Similarly, despite the ostensible restrictions on their representation and advocacy, defence counsel increasingly appeared at trial on behalf of the accused and took an ever more active and prominent role in the proceedings.<sup>132</sup>

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<sup>123</sup> *Ibid*, 314-315. It is worthy of note that in the 1700s the practice of Treasury Counsel grew in England. Certain counsel were retained to appear solely on behalf of the Crown, see Samuels, A, “Treasury Counsel” (1996) 15 (JAN) CJQ 9. Such counsel remain independent barristers, though acting for only one client, the State, see *Ibid*, 11. This prestigious office has continued to the present day. Office holders are required to act with the highest degree of integrity and professional ethics, see *Ibid*.

<sup>124</sup> (2001) 205 CLR 50.

<sup>125</sup> McHugh J notes that the average trial at the Old Bailey was a mere half an hour.

<sup>126</sup> *R v Azzopardi* (2001) 205 CLR 50 at 97-98.

<sup>127</sup> See Langbein (1999), above n 47; Langbein (1978), above n 48 and Langbein (1983), above n 48. See also Landsman, above n 28 and Beattie (1991), above n 28 and Cairns (1998), above n 43.

<sup>128</sup> (2001) 205 CLR 50 at 97-98. It will be noted the trial described by McHugh J is more akin to the inquisitorial process of civil law jurisdictions than the modern adversarial system of common law jurisdictions.

<sup>129</sup> McHugh J notes (2001) 205 CLR 50 at 99 that a simple measure of this trend is that from 2% in the 1770s the rate of defendants represented by counsel in felony trials at the Old Bailey had increased to 36% by 1795, see further Beattie, (1991), n 28, 227. It is not entirely clear when this transformation took place. The traditional view is that the pronounced trend from the inquisitorial type of hearing took place towards the end of the 1700s, as McHugh J indicates, and in the first half of the 1800s, see Cairns (1998), above n 43. However, more recent research indicates that this trend may have started as early as the 1730s, see Langbein (1978), above n 48, 312-313, Langbein, (1983), above n 48, 123-126 and Landsman, above n 28, 525-531 and 534-539.

<sup>130</sup> Though 36.6% of defendants at the Old Bailey were represented by counsel in 1795 (see Beattie, above n 28, 227), even as late as the 1840s in the Black Country in England 46% of criminal cases were still tried without either prosecution or defence counsel, see Taylor, D, *Crime, Policing and Punishment in England 1750-1914* (New York, St Martin’s Press, 1998) p 114. This trend persisted into the 1900s. See further below n 215.

<sup>131</sup> See Langbein (1999), above n 47, for a comprehensive analysis of this issue.

<sup>132</sup> Stephen, above n 3, 424. Though Stephen was unable to trace the origin of the easing of the prohibition on the use of defence counsel, modern scholars now tend to trace it back to as early as the 1730s, see Langbein (1978), above n 48, 307-314 and Landsman, above n 28, 534.



[2.4.3] The consequences of this development were ultimately to prove profound. What started, seemingly in the 1730s<sup>133</sup> as an act of indulgence on the part of trial judges in England, was to lead to the gradual but fundamental transformation of the nature of the criminal trial from an inquisitorial and lawyer-free "accused speaks" proceeding to an adversarial and lawyer-dominated "testing the prosecution case" contest that would be instantly recognisable to the modern criminal lawyer in either England or Australia.<sup>134</sup> This development may have been unforeseen and unintended,<sup>135</sup> but by the mid 1800s the transformation was complete. Cairns asserts that such leading criminal trials of the period as *R v Courvoisier* in 1840 and *R v Palmer* in 1855 demonstrate the ascendancy of the adversarial system of criminal justice.<sup>136</sup> Hostettler agrees: "[b]y 1845 the lawyers had captured the courtroom and made the trial accusatorial."<sup>137</sup>

[2.4.4] The development of the adversarial criminal process is a major factor explaining the development of the prosecutorial role as an impartial minister of justice. It was only with the increasing presence and involvement of prosecution counsel in felony cases in the burgeoning adversarial process of the early 1800s that the practical issue would need to have been considered as to the appropriate role of prosecution counsel.

[2.4.5] Even the legal system of the period was sensitive to the inequality in the positions of the parties and to the potential for injustice to an unrepresented accused in facing a legally represented prosecutor in an adversarial process. Indeed, various scholars speculate that the growing use by private prosecutors of counsel to prosecute unrepresented defendants prompted the initial efforts by the trial judges of the 1700s to allow defendants to be represented by counsel in trials for felonies. It was to "level the playing field."<sup>138</sup> The lack of any right to be represented by counsel when facing a prosecution represented by counsel was a familiar complaint of defendants during the State trials, especially for treason.<sup>139</sup> What struck more than one unrepresented defendant on trial for his or her life as grossly unfair was the fact that not only was he or she without legal representation but that he or she would have to confront at trial the

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<sup>133</sup> See *R v Azzopardi* (2001) 205 CLR 50 at 98-99.

<sup>134</sup> Hostettler (1992), above n 121, 43. For a full discussion of the development of the adversarial system of criminal justice in England, see Landsman, above n 28 and Cairns (1998), above n 43.

<sup>135</sup> Landsman, above n 28, 502.

<sup>136</sup> See Cairns (1998), above n 43, 163. It has been argued that the adversarial trend has been overstated as during the 1800s, and even beyond the mid 1800s a large proportion of criminal trials were still without lawyers, see May (2001), above n 92, 448. Though May asserts that Cairns overestimates the "adversarial" nature of the typical criminal trial of the mid 1800s, even she acknowledges that by 1850 the "foundation" of the modern adversarial trial had been laid, see May, above n 33, 6 and 200.

<sup>137</sup> Hostettler (1992), above n 121, 58. As further evidence of the ascendancy of the adversarial criminal trial it is notable that by the 1840s the judges were no longer prepared to assume their previous inquisitorial responsibility for the examination of the witnesses, see *R v Hezell* (1844) 1 Cox CC 384 and *R v Page* (1847) 2 Cox CC 221. See further Cairns (1998), above n 43, 46.

<sup>138</sup> See Beattie (1991), above n 28, 224-226; May, above n 33, 27 and Langbein (1978), above n 48, 312-313 cf. Langbein (1999), above n 47, 317-319 where he argues that the increasing use of solicitors to investigate and manage prosecutions rather than the use of prosecution counsel at trial influenced the relaxation of the rule against defence counsel.

<sup>139</sup> See, for example, *R v Lilburn* (1649) 4 St Tr 1269 at 1294-96 and 1317, *R v Twyn* (1663) 6 St Tr 513 at 516-517, *R v College* (1681) 8 St Tr 549 at 570 and 579 and *R v Noble & Ors* (1713) 15 St Tr 731 at 747.

Attorney-General or some similar highly-trained lawyer representing the Crown. The protests of the accused in *R v Love*<sup>140</sup> are illustrative:

I now see Mr. Attorney’s words to be true. When he came to me in the Tower, and examined me on the 16<sup>th</sup> of this Month, he said, that seeing I would not acknowledge (as he called them) my Treasons, I was judged peremptory and obstinate: and I remember he said these words to me; Mr. Love, though you are too hard for me in the pulpit, yet I will be too hard for you at the Bar. And truly now I find it so, and it is an easy matter for a Lawyer armed with Law and Power, to be too hard for a poor naked scholar, that hath neither Law nor Power.<sup>141</sup>

[2.4.6] Scholars of the period such as Hawles<sup>142</sup> and Foster<sup>143</sup> confirm the substance of this complaint. Writing in 1721, Hawkins also noted the injustice of an unrepresented defendant facing the partisan efforts of prosecution counsel at a State trial.

Experience... [had shown that there were] great Disadvantages from the want of [defence] Counsel in Prosecutions of High Treason against the King’s Person which are generally managed by the Crown with greater Skill and Zeal than ordinary Prosecutions.<sup>144</sup>

Hawkins’ reference to the “skill and zeal” used by prosecution counsel is significant. As Langbein explains, “By ‘Skill’ Hawkins was referring to the Crown’s use of lawyer prosecutions in treason cases. ‘Zeal’ signalled the prosecutorial abuses that had occurred in the Stuart trials.”<sup>145</sup>

[2.4.7] This theme continued to resonate beyond the “Glorious Revolution” of 1688.<sup>146</sup> Though the criminal justice system of the late 1700s may seem punitive and unfair by the standards of today, the courts of the period were not entirely unsympathetic to the plight of the accused and were prepared on occasion to try to reduce the odds in favour of the prosecution at trial.<sup>147</sup> As early as 1732 one trial judge emphasised the importance of adherence to due process at trial so “that the publick [sic] may be satisfied that no unfair Practices have been made use of.”<sup>148</sup> There were a number of legal developments

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<sup>140</sup> *R v Love* (1651) 5 St Tr 43. Love faced charges of a religious nature during Cromwell’s regime.

<sup>141</sup> (1651) 5 St Tr 43 at 90. See also (1651) 5 St Tr 43 at 52-55 and 61.

<sup>142</sup> Hawles, J, *Remarks upon the Tryals of Edwards Fitzharris* (London, Jacob Tonson, 1689) p 32, 37 and 43.

<sup>143</sup> Foster, M, *A Report of Some Proceedings... for the Trial of the Rebels in the Year 1746 ...To Which are Added Discourses upon a Few Branches of Crown Law* (London, W Strahan and M Woodfall, 1762), p 231.

<sup>144</sup> Hawkins, above n 46, 402.

<sup>145</sup> Langbein (2003), above n 33, 98. Indeed, as a result of the abuses in the State Trials under Cromwell and the Stuarts, Parliament in 1697 allowed defendants facing charges of treason (who were often from the leading families in England) the right to legal representation. Interestingly, as with the similar entitlement to the accused charged with treason to disclosure of the indictment and the names of the prosecution witnesses prior to trial, both these entitlements were not extended to “ordinary” defendants. See further Part 2 of Chapter 5 at [5.2.3].

<sup>146</sup> Many of the leading families of England had ancestors who would have suffered personally under the excesses of both Cromwell and the Stuarts in the 1600s, see Hay, D, “Controlling the English Prosecutor” (1983) 21 Osgoode Hall L Jour 165 at 171.

<sup>147</sup> See Macnally, L, *The Rules of Evidence on Pleas of the Crown* (London, J Butterworth, 1802), p 7 quoted at Landsman, above n 28, 499, n 8.

<sup>148</sup> *R v Patrick*, Central Criminal Court, 6 September 1732, No T 17320906-26.

throughout the 1700s that improved the defendant's situation.<sup>149</sup> As Landsman notes, "[a]ll these developments suggest that the legal community of the day saw its task not simply as convicting the guilty, but as satisfying a profound social desire for fair play."<sup>150</sup> This concern for the defendant's position was to find practical expression in the oft-quoted principle as explained in 1823 by Holroyd J, "it is a maxim of English law that ten guilty men should escape rather than one innocent man should suffer."<sup>151</sup> The theme of promoting fairness and seeking to level the unequal odds between the prosecution and accused was a theme that was to continue throughout the nineteenth century and beyond. The development of the prosecutor's role as a minister of justice must be viewed in this context.

[2.4.8] The disparity between the respective positions of a legally represented prosecutor and an unrepresented defendant was obvious. Even in the late 1700s and early 1800s there was appreciation of the injustice that could result from the zealous prosecution of an accused, especially if the accused was unrepresented and the prosecution was represented by counsel.<sup>152</sup> In the largely inquisitorial legal process of the 1700s when prosecutors were seldom legally represented the issue may well have been largely academic. However, with the increasing presence of prosecution counsel in the emergent adversarial process of the early 1800s the issue was no longer theoretical and would have assumed real practical significance. The situation that had confronted the unrepresented accused in *Love*, far from being an isolated anomaly, became an increasingly regular occurrence. The courts were aware of the potential for injustice and on occasion sought, albeit within the framework of the criminal process of the period, to improve the unequal position of the accused.<sup>153</sup> Beattie remarks that it "seems reasonable" that the increased use of prosecution counsel in the 1700s "produced the same sense of imbalance and unfairness that had led to the admission of defence counsel in treason cases in 1696" and this imbalance induced the courts in the 1700s to relax the prohibition on the use of defence counsel in felony trials.<sup>154</sup> I would take this reasoning one step further. The discretionary introduction of defence counsel was a welcome, but limited, means of seeking to protect the position of the accused in the increasingly adversarial criminal

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<sup>149</sup> Though Landsman does not refer to the prosecutorial role as a minister of justice he does include such developments to assist the accused as the curbs on the use of out of court confessions, the introduction and use of defence counsel and the rigour with which the evidence of accomplices and so-called "thief catchers" (private prosecutors motivated by the generous rewards that were offered for the successful prosecution of certain offences) was viewed at trial, see Landsman, above n 28, 603-604). The abuses that accompanied private prosecutions motivated by rewards are thought to be of particular significance in explaining why the courts allowed the use of defence counsel, see Langbein (1983), above n 48, 106-114; Langbein (1999), above n 47, 356-365 and Landsman, above n 28, 572-580.

<sup>150</sup> *Ibid*, 604.

<sup>151</sup> *R v Hobson* (1823) 1 Lew CC 261. In *R v White* (*The Australian*, 29 April 1826) Stephen ACJ emphasised this principle of British law and observed that the "ends of substantial justice would be better served" (*Ibid*) by allowing 20 guilty men to escape unpunished than risk an innocent man perishing if a doubt existed.

<sup>152</sup> The legacy of the unrepresented defendants in the State trials such as *Love* would have lingered.

<sup>153</sup> See, for example, *R v Hardy*, Central Criminal Court, 8 May 1799, No T17990508-50. See further Landsman, above n 28, 499, n 8 and Lemmings, D, "Criminal Trial Procedure in Eighteenth-Century England: The Impact of Lawyers" (2005) 26 *Jour Legal His* 65-69.

<sup>154</sup> Beattie, above n 28, 224-226. See also Langbein (1978), above n 48, 312-313 cf. Hostettler (2006), above n 28, 52.

trial. It is clear that “grievous shortcomings”<sup>155</sup> in criminal procedure still remained.<sup>156</sup> Another, and perhaps more effective, means of striking a fairer balance between the positions of prosecution and accused, was to proceed upon the basis that the prosecuting lawyer, regardless of whether the accused was legally represented or not and whether the prosecutor was the Crown or a private litigant, should act in the impartial and restrained manner of a minister of justice. Such a development only emerged with the evolution of an adversarial criminal process. The transformation of the criminal trial to an adversarial system exposed the underlying inequalities in the accused’s and prosecutor’s positions. The adversarial context could not serve as a mechanism for exposing the truth, unless some degree of equality existed between the contestants.<sup>157</sup>

[2.4.9] It was understandable that as the criminal process evolved into an adversarial model that the defendant’s unequal position would be alleviated if any prosecuting counsel should temper his newly acquired prominence in the criminal trial by recognising, as had been suggested by Queen Elizabeth over two centuries earlier, that his role was to promote the truth and not simply to act as the partisan mouthpiece of his client. However, the transformation of the criminal process from an inquisitorial to an adversarial model, while an important development, does not provide the sole explanation why the notion of the prosecutorial role as a minister of justice emerged in the first part of the nineteenth century. Other factors are also significant. My argument is that not only the defendant’s general disadvantaged position in the adversarial criminal process explains the development of the prosecutorial role as a minister of justice but two specific aspects of that process: notably the restrictions on the use of defence counsel, and the reliance during this period on private prosecutors stand out in explaining why the notion of prosecutorial restraint emerged and gained such widespread acceptance when it did.

## **Part 5: The Legal System of the Nineteenth Century: The Disadvantaged Accused**

[2.5.1] There can be little doubt that the accused was in a disadvantaged position in the criminal process of the nineteenth century, and the odds were heavily, though not completely, stacked against him or her. As Bentley notes of the legal system of the period, “Rights regarded today as lying at the heart of the fair trial were denied to the accused as either unnecessary or actually obstructive of justice.”<sup>158</sup> Marshall J’s suggestion to the jury at a trial in 1847 that “we cannot have any doubts as to the prisoner’s guilt; his very countenance would hang him”<sup>159</sup> may be an especially frank expression of judicial

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<sup>155</sup> Langbein (1978) above n 48, 314. Langbein speculates how many innocent defendants ended up wrongly convicted and “condemned” during this period, see *Ibid*.

<sup>156</sup> The accused may well, as was still most often the case, have had no legal representation and there were still (as would remain the case well into the 20<sup>th</sup> century) a whole raft of aspects of the criminal justice system that had a deleterious impact on the position of the accused in the criminal process, see further Part 5 of this Chapter.

<sup>157</sup> See Cairns (1998), above n 43, 98. See also the discussion in Part 9 of this Chapter, especially nn 328-330.

<sup>158</sup> Bentley, D, *English Criminal Justice in the Nineteenth Century* (London, Hambledon Press, 1998) p 297.

<sup>159</sup> Lewis, J, *The Victorian Bar* (London, Robert Hale, 1982) p 29.

sentiment,<sup>160</sup> but such a declaration was by no means unique during the period.<sup>161</sup> Such comments serve to illustrate the "loaded dice" that typically confronted the nineteenth century defendant.

[2.5.2] Nonetheless, for all its imperfections to a modern eye there was widespread public confidence throughout the 1700s and 1800s in the ability of the jury to deliver justice and a belief that trial by jury in an English court was superior to any alternative forms of justice.<sup>162</sup> Many scholars and lawyers of the period, such as Mr. Fielding in *Hardy*, can be found propounding the virtues of trial by jury and the superiority of the English system of criminal justice over that practised anywhere else.<sup>163</sup> Such declarations of faith, while having a hollow ring, are not completely fatuous. For all its flaws and injustice, the criminal process of the 1800s (and that of the 1700s) was not wholly stacked against the accused. The Crown may well have entered the race with a long start, as Stephen noted,<sup>164</sup> but it was by no means inevitable that the accused would be convicted. Though a defendant's chances of acquittal were obviously enhanced through effective legal representation at trial, even an unrepresented accused, especially if unusually eloquent<sup>165</sup> or blessed with good fortune,<sup>166</sup> might end up acquitted. Indeed, a significant proportion of defendants throughout both the 1700s and 1800s were acquitted at trial, whether on a "technical" basis or on the merits.<sup>167</sup> There were other obstacles to a successful prosecution. Bentley notes that it was far from a foregone conclusion that the English grand jury would return a true bill and some grand juries, especially in London in the 1820s and 1830s, approached their task in a technical, if not perverse, manner and often

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<sup>160</sup> Taylor, above n 130, 114.

<sup>161</sup> See also, for example, the trial of two minutes and 49 seconds in the 1840s as recited by Stephen J with his comment to the jury that he had no doubt as to the guilt of the accused, see *R v H* [2004] 2 AC 134 at 145.

<sup>162</sup> See, for instance, the fulsome remarks of the Attorney-General in *R v Tibbs* [1824] TASSupC 1 (*Hobart Town Gazette*, 28 May 1824) and Willis J in *R v Cordell* [1838] NSWSupC 39 (*The Australian*, 4 May 1838). The inference behind such declarations of faith was that trial by an English jury was obviously superior to any form of justice practised elsewhere.

<sup>163</sup> See the comments quoted earlier in this Chapter of Mr. Fielding, above n 61.

<sup>164</sup> Stephen, above n 3, 397.

<sup>165</sup> See *R v Redding* (*The Times*, 11 August 1823); *R v Edwards*, Worcester Crown Court, 11 March 1828 (*The Times*, 14 March 1828); *R v Taylor* [1829] NSWSupC 30 (*The Australian*, 26 May 1829) and *R v Williams* (*Hobart Town Courier*, 30 June 1843) for rare instances of unrepresented but unusually articulate defendants who were able to secure their acquittals at trial. More typical, I would suggest, are cases such as *R v Palmer*, Central Criminal Court (*The Times*, 8 November 1810); *R v Taylor* [1829] NSWSupC 30 (*The Australian*, 26 May 1829) *R v Kaines* [1833] NSWSupC 101 (*Sydney Herald*, 18 November 1833), *R v Ryan & Ors* [1836] NSWSupC 25 (*Sydney Herald*, 9 May 1836) and *R v Lynch* [1841] NSWSupC 47 (*The Australian*, 15 May 1841) where the eloquence of legally unrepresented defendants or "bush lawyers" (*Sydney Herald*, 9 May 1836) did not prevent their conviction. See also Bentley, above n 158, 297.

<sup>166</sup> See the unrepresented defendants in cases such as *R v Taker* (*The Times*, 16 August 1824) and *R v Samuel* [1834] TASSupC 3 (*Colonial Times*, 11 March 1834) who benefited from the benevolence of the trial judge.

<sup>167</sup> A scrutiny of the trials considered in both Australia and England as part of the research for this Thesis has confirmed that a significant number of accused were acquitted. Cockburn comments that between the 16<sup>th</sup> and 18<sup>th</sup> centuries from a quarter to a half of those indicted in England were acquitted for whatever reason, see Cockburn, J, *Crime In England: 1550-1800* (London, Methuen, 1977) p 23. Cairns quotes a survey of English criminal trials on indictment in the period between 1805 and 1834 that reveals an acquittal rate of between 28% to 43%, see Cairns (1998), above n 43, 184.

threw out many wholly meritorious prosecutions.<sup>168</sup> Despite official blandishments such as rewards or the reimbursement of costs, the private prosecutors of the period often proved unable or unwilling to proceed at trial.<sup>169</sup> There were a myriad of technical rules in areas such as the content of indictments<sup>170</sup> and the capacity of witnesses,<sup>171</sup> notably children,<sup>172</sup> to give sworn evidence that had the practical effect of allowing many apparently guilty offenders to escape unpunished.

[2.5.3] However, the compensatory effects of these factors should not be exaggerated. The criminal process of the early 1800s remained fundamentally unfair to the accused. And this unfairness was not only apparent when viewed through the eyes of the modern observer. It is notable that contemporary observers were also not blind to the many defects of the British criminal justice system, especially that of the first half of the nineteenth century. The editor of *The Australian* in 1835, in the course of his critical assessment of the fairness of the trial in *R v Monkey*<sup>173</sup> in which several Aborigines had been convicted of the murder of a shepherd near Brisbane Water, offered a damning appraisal of the fairness of the entire British criminal process:

As for the fairness of their [Monkey’s] trial, we should be glad to know how many persons in Ireland have been falsely accused, and convicted through bad management on their own parts, or perjury on the part of others? The well authenticated tales of such

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<sup>168</sup> Bentley, above n 158, 129-132. Bentley notes that in London the grand jury could reject up to 10% of indictments.

<sup>169</sup> See Beattie, J, *Crime and the Courts in England: 1660-1800* (Oxford, Clarendon Press, 1986) p 35-36 and Emsley, C, *Crime and Society in England, 1750-1900* (London, Longman, 1987) p 185-189.

<sup>170</sup> It is thankfully beyond this Thesis to explain the highly technical law of the first half of the 1800s governing indictments. The rules governing the legal and factual content of indictments were convoluted and little short of Byzantine. To meet these rules indictments could either reach an extraordinary length (see *R v Grace* (1846) 2 Cox CC 101 where the indictment would have taken two days to read in full!) or contain an extraordinary number of alternative counts (Stephen notes an indictment that contained almost 70 counts in respect of a single murder as the murderer had burnt the body and it was impossible to establish precisely how she had died so every conceivable scenario as to how she had died was included, see Stephen, above n 3, 287, n 1). There were such scandalous cases as *R v Sheen* (1827) 2 C & P 634 where even a murderer could escape guilt on the most technical of points relating to the indictment (the infant victim was named as “Charles William Beadle” on the indictment but was referred to as “William” or “Barry” at trial). Such cases were not unusual and there even existed a specialised class of lawyers to raise such technical defences, see Hostetter (1992), above n 121, 150.

<sup>171</sup> See *R v Squires & McCourt* [1837] NSWSupC 79 (*Sydney Herald*, 6 November 1837). The witness had to appreciate the solemn nature of an oath and the religious aspects behind it. This had the practical effect in nineteenth century Australia that the court could not admit the evidence of Aboriginal witnesses or victims as they were not Christians. See the frank discussion of the Attorney-General in *R v Dundumah* [1840] NSWSupC 82 (*Sydney Herald*, 10 November 1841). There might be one or ten Aboriginal eye-witnesses to a murder of Aborigines but, as Woods notes, such compelling witnesses were “effectively silenced” (Woods, G, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (Sydney, Federation Press, 2002) p 140). Such a situation was plainly, as Woods asserts, “grievously unjust.”

<sup>172</sup> See *R v Roach* [1841] TASSupC 30 (*Launceston Advertiser*, 8 July 1841) for the almost farcical examination of a child by the trial judge who was deemed unfit to give evidence as she did not go to Church and was unable to explain the exact nature of an oath. The Attorney-General suggested that many jurors would also have found it difficult to have explained this. See also *R v Williams* (1836) 7 C & P 320, *R v Collard* [1837] NSWSupC 1 (*The Australian*, 7 February 1837) and *R v Nicholas* (1846) 2 Cox CC 136.

<sup>173</sup> [1835] NSWSupC 6 (*The Australian*, 13 and 17 February 1835). The editor noted that the status of Monkey and his co-accused was such that “it was almost a mockery to bring them to the unintelligible formality of a trial” (*The Australian*, 13 February 1835).

unfortunate convictions in that country, are numerous, and occur, we fear, much oftener than is suspected by those who are not fully acquainted with the Irish character; how far the accused in England have always a chance of being tried fairly, may be learn't [sic] from the following :

Extract from the Enquiry of the Commissioners into the Affairs of the Corporation of London; Mr. Clarke is the Clerk of the Peace for the City of London.

'Mr. Commissioner Drinkwater enquired of Mr. Clarke, whether the statements publicly made of the hurried manner in which the trials at the Old Bailey, for minor offences, took place, had any foundation. Mr. Clarke stated, that not only minor offences, but even those for which the prisoners were sentenced to transportation for life, were conducted in a manner extremely discreditable to the administration of justice. He had known one Middlesex Jury convict seventy-three [sic] persons at one sitting! ! !

'Mr. Alderman Harmer presented himself to the Commissioners and stated, that it was his intention to bring forward the present extremely objectionable practice of trying prisoners against time, before the Court of Aldermen, and if he could not obtain reform there, to carry the subject to a higher tribunal. The system, both at the Old Bailey and at the Middlesex Sessions in all cases except where the Judges preside, was calculated to bring the administration of criminal justice into odium. "The verdict of the Jury was the mere dictum of the Recorder – hundreds of innocent persons had been transported -- females especially." His long experience in the practice of the Old Bailey enabled him to know, that the present system required thorough purgation.'<sup>174</sup>

[2.5.4] Such a damning indictment of the inequalities of the British criminal justice system of the first half of the 1800s is justified. For offences that would today be viewed as trifling, the sentences were excessive and included transportation to the other side of the world, and even the death penalty.<sup>175</sup> The accused was prosecuted not by a dispassionate and objective public prosecutor, but on a strictly private basis by the victim or complainant who may well have a partial, malicious or corrupt agenda to pursue.<sup>176</sup> The magistrate was far from the objective judicial figure of today. He acted as a combination of detective and public prosecutor and was involved intimately in not only the investigation, but also in the prosecution of the alleged offence, even to the point of appearing as a prosecution witness at trial.<sup>177</sup> The accused was likely to find that he or she was remanded in custody prior to their trial in conditions that were "appalling"<sup>178</sup> with little ability to prepare any defence and with no means of locating and securing the

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<sup>174</sup> *The Australian*, 17 February 1835. See further Bentley, above n 158, for an overview of the nineteenth century English criminal process.

<sup>175</sup> There were over 220 statutes and a total of more than 350 offences in England that carried the death penalty in 1800, see Ellard, J, "Law and Order and the Perils of Achieving It" in Chappell, D and Wilson, P, *Issues in Australian Crime and Criminal Justice* (Chatswood, Lexis Nexis Butterworths, 2005) p 268.

<sup>176</sup> See further the discussion in Part 7 of this Chapter.

<sup>177</sup> See Stephen, above n 3, 220-228; Langbein (2003), above n 33, 40-47 and Taylor, above n 130, 112. Stephen notes the inquisitorial approach of the Magistrates as late as 1823 in *R v Thurtel* (*The Times*, 31 October and 5 December 1823) who even prevented the accused from consulting his lawyer prior to trial and took the evidence of the prosecution witnesses at committal in the absence of the accused, see Stephen, above n 3, 227-228 cf. *Cox v Coleridge* (1822) 1 B & C 37 at 51-52 which emphasised the Magistrate's judicial role in determining whether the defendant should be committed for trial. This role was only confirmed by "Sir John Jarvis's" Act of 1848, see Stephen, above n 3, 228.

<sup>178</sup> Langbein (1994), above n 48, 1057.

attendance at trial of any witnesses who might assist his or her case.<sup>179</sup> Many defendants were poor and illiterate and notwithstanding the punitive nature of the potential sentence if convicted, the state provided no means of legal aid or assistance.<sup>180</sup> Most defendants were tried without any form of legal representation.<sup>181</sup> Even if the accused were fortunate enough to be able to afford or secure the services of counsel there was no right, as such, to legal representation and defence counsel was, in theory at least, severely restricted in his role at trial and was unable to address the jury on behalf of the accused. The accused was left ignorant of both the identities of the prosecution witnesses and their intended evidence until the very moment of trial.<sup>182</sup> The accused was even denied a copy of the indictment outlining the charges that he or she would face.<sup>183</sup> Despite having enjoyed no sight of the prosecution evidence prior to trial the accused was expected, nevertheless, spontaneously to make good his or her defence and challenge the prosecution case when confronted by the live testimony of the prosecution witnesses at trial.<sup>184</sup> How the accused was to do that when he or she was prevented from giving sworn evidence was never made completely clear.<sup>185</sup> Trials on indictment were rushed and perfunctory affairs, with the typical trial taking little more than a few minutes.<sup>186</sup> Summary trials were even worse and were “little short of scandalous.”<sup>187</sup> The accused

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<sup>179</sup> *Ibid*, 1057-1058. See further the discussion in Part 3 of Chapter 7.

<sup>180</sup> This was not to be remedied until the *Poor Persons Defence Act* 1903 and, arguably, was not completely rectified in England till the 1960s when a comprehensive legal aid scheme was finally established, see Spencer, Ch 1 n 190, 242. In New South Wales Woods notes that it was not until the 1890s that the legislature “haltingly” started the development of a system of free State provided legal representation for indigent accused, see Woods, above n 171, 340.

<sup>181</sup> The injustice of such a situation was highlighted by Stephen in 1886. He commented, “It must be remembered that most persons accused of crime are poor, stupid and helpless...When a prisoner is undefended his position is often pitiable, even if he has a good case. An ignorant uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged.” (Stephen, above n 3, 442). See also Langbein (1994), above n 48, 1053 and Beattie (1996), above n 169, 350-351.

<sup>182</sup> See *R v Sheridan* (1811) 31 St Tr 544 at 545 and 557; *R v Thurtel* (*The Times*, 31 October and 5 December 1823) and *R v Duffy* (1847) 1 Cox CC 367 at 369. See further the discussion in Part 2 of Chapter 5.

<sup>183</sup> The rationale for this seemingly harsh rule of practice (see above n 170) was to avoid defendants securing unmeritorious acquittals by raising arcane, but often effective, points as to the wording or particulars of the indictment. See the frank acknowledgment of Erle J in *R v Lacey and Ors* (1848) 3 Cox CC 517 at 518.

<sup>184</sup> See further Part 2 of Chapter 5 at [5.2.2].

<sup>185</sup> The accused was only given the right to give sworn evidence in England by the *Criminal Evidence Act* 1898.

<sup>186</sup> See the trial of two minutes and 49 seconds of the 1840s recited by Stephen J as described by Lord Bingham in *R v H* [2004] 2 AC 134 at 145-146. Such rushed trials, far from being unusual, were the norm, see Langbein (1978), above n 48, 277-280; May, above n 33, 97 and Bentley, above n 158, 76.

<sup>187</sup> *Ibid*, 297. In this context many scholars cite the notorious case of a farmer who was prosecuted and fined under the *Game Laws* for an alleged offence committed on the land of the Duke of Buckingham. The prosecution was brought by two gamekeepers employed by the Duke, the witness was another gamekeeper employed by the Duke and the Duke himself as a Justice of the Peace conducted the trial in his private residence. There are arguments that the criticisms of the summary courts of the 1800s are exaggerated, see Emsley, above n 169, 199-207 and Bentley, above n 158, 26-28.



didn't even enjoy a right to be legally represented in such proceedings.<sup>188</sup> Finally, if an accused was convicted he or she enjoyed virtually no rights of appeal.<sup>189</sup>

[2.5.5] Amongst the many flaws of the early nineteenth century criminal process there is one crucial flaw that is often overlooked. This issue was raised and applied by the Attorney-General in his role as a minister of justice in 1843 in the Tasmanian case of *R v Sparks and Campbell*;<sup>190</sup> namely the need to ensure that all material witnesses and evidence, even if unhelpful to the prosecution case, were brought before the court and/or the accused and that no relevant evidence was withheld.<sup>191</sup> Hostettler describes this as the "fundamental defect of English criminal procedure" of the period and notes the lack of any means to ensure that all possible relevant evidence was brought before the court and/or the accused.<sup>192</sup> This is a valid argument. The accused, prior to 1836 enjoyed no right to the depositions or statements of the prosecution witnesses prior to trial,<sup>193</sup> and no entitlement to other material in the prosecution's possession that may have undermined the prosecution case or supported his or her defence.<sup>194</sup> There was simply no procedure for ensuring that all material relevant to the guilt or innocence of the accused was brought either to his or her attention and/or that of the court of trial and was not withheld by the prosecution and that any significant witness would be called at trial. This was especially vital in the 1800s where there was ordinarily an acute imbalance between the resources of the prosecution and of the accused.<sup>195</sup> The prosecution may well have held relevant material or known of relevant witnesses pertaining to the guilt or innocence of the accused. However, the prosecution may not have proved as fair and candid as the Attorney had in *Sparks and Campbell*, and for whatever reason may have chosen not to provide that material to the court or the accused or not to call those witnesses at trial.<sup>196</sup>

[2.5.6] The disadvantageous position of the accused in the criminal process of the early 1800s, as made so plain in *Monkey* by the editor of the *Australian*, underlies the development of the concept of the prosecutor as a minister of justice. The development of the prosecutor's role did not occur in a vacuum and can only be understood by having

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<sup>188</sup> *Collier v Hicks* (1823) 2 B & A 663.

<sup>189</sup> This was not remedied until a comprehensive right of appeal was introduced by the *Criminal Appeal Act* 1907.

<sup>190</sup> See *Hobart Town Courier*, 4 August 1843, p 4; *Hobart Town Advertiser*, 28 July 1843 and *Colonial Times*, 1 August 1843, p 3.

<sup>191</sup> See further the discussion in Part 3 of Chapter 3 of the notable minister of justice role adopted by the Attorney-General in this case.

<sup>192</sup> Hostettler (1992), above n 121, 148.

<sup>193</sup> See cases cited above in n 182.

<sup>194</sup> *R v Holland* (1792) 4 TR 691. See further the discussion in Part 2 of Chapter 5 at [5.2.4]-[5.2.7].

<sup>195</sup> The issues associated with the obligation of the prosecution not to hold back relevant material or witnesses are vital and the disparity between the positions of the parties are not confined to the 1800s and have continued to trouble the criminal justice system to the present day. The many notorious miscarriages of justice due to non-disclosure of significant material such as *R v Ward* [1993] 1 WLR 619 (see further Part 5 of Chapter 5) and *R v Mallard* (2005) 224 CLR 125 (see further Part 7 of Chapter 5) bear testimony to this fact. See the further discussion in Chapters 5 and 6 (disclosure) and Chapters 7-10 (calling witnesses).

<sup>196</sup> *R v O'Farrell* in 1868 is a prime example, see further the discussion of this case in Part 3 of Chapter 5.

regard to the wider legal and social framework of the time. Both the defendant’s disadvantaged position in the criminal justice system and the increasingly adversarial nature of that process prompted the rise in the early 1800s of the prosecutorial role of a minister of justice. Not only was an unrepresented accused increasingly likely to confront a legally represented prosecutor, but any trial of the accused when prosecution counsel was instructed would have exacerbated the defendant’s already disadvantaged position at trial. Of those many disadvantages<sup>197</sup> I would suggest that the two aspects of the criminal process that warrant particular consideration in explaining the transformation in the role of the prosecution lawyer are: the severe restrictions on the right of the accused to legal representation, and the fact that enforcement of the criminal law and responsibility for the prosecution of offences rested with private individuals.

**Part 6: Restrictions on the Right of Accused to Legal Representation:  
“What can be a more monstrous perversion of every principle of justice?”**

[2.6.1] It is clear that the situation that confronted the accused in *Love* in 1651 would strike most modern observers as unacceptable. The fact that the accused was denied “the right” to legal representation at trial was bad enough but to be denied legal representation when the prosecution was legally represented was grossly unfair. Prior to the *Prisoners Counsel Act* 1836 the entitlement of the accused at trial to be legally represented and the extent of counsel’s involvement were dependent upon the discretion or whim of the trial judge. Practices differed from one circuit to another and from one judge to another.<sup>198</sup> The variances in the degree of involvement that were permitted persisted right up until the 1836 Act which finally removed such disparities.<sup>199</sup>

[2.6.2] Even if the accused was fortunate enough to be legally represented, defence counsel prior to 1836 were greatly restricted, in theory at least, in their conduct of the defence case at trial. An unrepresented prosecutor had no right either to address the jury or state the prosecution’s case and had to instruct counsel if he or she wished to do so.<sup>200</sup> However, prosecution counsel, if instructed,<sup>201</sup> was free to address the jury and to state the nature of their case and to examine and cross-examine witnesses.<sup>202</sup> By way of contrast, even if the accused was legally represented, until 1836 defence counsel was prevented from taking the same full role in the proceedings enjoyed by prosecution counsel. Defence counsel could be permitted if “some Point of Law arise[s] proper to be debated”<sup>203</sup> but in practice this exception had little scope.<sup>204</sup> The role of defence counsel

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<sup>197</sup> See the earlier discussion in Part 5 of this Chapter.

<sup>198</sup> As early as 1741 prosecution counsel in *R v Goodere* (1741) 17 St Tr 1003 at 1022 remarked about the marked inconsistencies in judicial approach to the extent, if any, defence counsel were permitted to take part in the trial. See further Langbein (1999), above n 47, 362-363.

<sup>199</sup> Langbein (1978), above n 48, 313.

<sup>200</sup> See *R v Brice* (1819) 2 B & Ald 606 and the discussion of the report writer accompanying *R v Gurney* (1869) 11 Cox CC 414 at 422, n (a).

<sup>201</sup> It will be recalled that in the 1700s and well into the 1800s this was uncommon, see above n 130. See further Gallanis, T, “The Mystery of Old Bailey Counsel” (2006) 65 Cam L Jour 159 at 162.

<sup>202</sup> See Langbein (2003), above n 33, 287-288. See also Cairns (1998), above n 43, 4 and 54.

<sup>203</sup> Hawkins, above n 46, 400.

was extended in the 1700s for the limited purpose of allowing defence counsel to examine and cross-examine the witnesses at trial.<sup>205</sup> However, the accused was not entitled to be legally represented at the preliminary examination before the magistrate.<sup>206</sup> Furthermore the defence still lacked the crucial entitlement held by prosecution counsel to address the jury on their client's behalf and to state the nature of their case and offer a defence against the facts put in evidence.<sup>207</sup> This state of affairs attracted the scrutiny of the editor of the *Tasmanian* in 1832 in the case of *R v Cam and Denner*.<sup>208</sup> The two accused were convicts who had been charged with piracy arising from their seizure of a boat from Macquarie Harbour in an effort to escape. The Attorney-General addressed the jury at considerable length, though with restraint and "great forbearance."<sup>209</sup> Nevertheless, the lack of any similar entitlement by defence counsel to address the jury attracted the editor's indignation:

What can be a more monstrous perversion of every principle of justice, than the practice, that [prosecution] Counsel of the highest ability should address Juries in speeches of any duration – introducing whatever topic they may choose, while the accused are not permitted to reply by Counsel – not even to rebut, perhaps false statements made by the Counsel for the prosecution – not even to explain the bearing and tendency of the exculpatory evidence about to be produced! Can, we ask, anything be more monstrous than such a practice as this?<sup>210</sup>

[2.6.3] The connection between the defendant's lack of any formal entitlement to full legal representation prior to the *Prisoners Counsel Act* and the emergence of the concept of prosecutorial restraint is clear. As both the Attorney-General in *Fauntleroy* in 1824 and Dickenson and Talfourd in 1829 had explained, the prosecutor's duty to confine his opening address to a restrained and understated summary of the case was due to the lack of any similar opportunity for counsel for the accused to address the jury.<sup>211</sup> It was a

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<sup>204</sup> Langbein (1999), above n 47, 316. See the cases listed above at n 139.

<sup>205</sup> Langbein (1999), above n 47, 317.

<sup>206</sup> *Cox v Coleridge* (1822) 1 B & C 37.

<sup>207</sup> See further Beattie, above n 28, 231, Cairns (1998), above n 43, 3-4 and 55, Woods, above n 171, 145-148 and Gallanis, above n 201, 162. This could literally prove to be a matter of life and death as with the famous trial in *R v Kilmeister No 2* [1838] NSWSupC 110 (*The Australian*, 1 December 1838) where the defendants were convicted and hanged without the benefit of a closing address at trial from defence counsel and as Willis J later asked in *Ex parte Nichols* (1839) 1 Legge 123 at 133 "who can say what might have been the effects of an impassioned and eloquent defence by Counsel on the minds of the Jury" in that trial.

<sup>208</sup> [1832] TASSupC 19 (*Tasmanian*, 7 April 1832). Though this is a Tasmanian case it is equally valid as an English case in exposing the inequality of the law at that time as the law on this issue was identical in both Tasmania and England. Australian cases of the period are of value in this context.

<sup>209</sup> *Tasmanian*, 7 April 1832. The prosecutor's minister of justice role shown in *R v Cam & Denner* was far from universally applied in practice in colonial Australia. See further the discussion in Chapter 3 of the development of the prosecutorial role in Australia.

<sup>210</sup> *Ibid.* See also *R v Guillem* [1837] TASSupC 2 (*Tasmanian*, 17 March 1837) where the editor again attacked the "flagrant injustice" of defence counsel being unable to speak a word in favour of the prisoner to explain the circumstantial evidence in a murder trial when the "powerful array" of the Attorney-General, the Solicitor-General and the Crown Solicitor had been free to address the jury and "get up" the prosecution case. *Ibid.* See further *R v Absolom* [1828] NSWSupC 5 (*The Australian*, 13 February 1828).

<sup>211</sup> See the references above at n 154.

“peculiar notion” as Langbein explains “which [had] developed to mitigate the unfairness of the continuing restrictions on the scope of defence counsel’s activity in felony cases.”<sup>212</sup>

[2.6.4] It is noteworthy that the notion of prosecutorial restraint was employed by opponents of proposals prior to the introduction of the *Prisoners Counsel Act* in 1836 to allow defence counsel a full and unrestricted role in the criminal trial. It was argued that to allow defence counsel to enjoy the same rights at trial as those held by prosecution counsel would lead prosecution counsel to discard their valued notions of restraint and objectivity and to assume a combative role at trial to counter the likely partisan efforts of defence counsel.<sup>213</sup> The Solicitor-General in 1821 opposed allowing defence counsel the right to address the jury on the basis that such a measure would “change the character of his [the prosecutor’s] address to the jury, and operate to some degree upon their passions instead of their reason.”<sup>214</sup>

[2.6.5] Despite the steady inroads during the eighteenth century on the rule that refused the accused the benefit of the full representation of counsel at trial this remained an explanatory factor for the insistence that prosecution counsel should function as a minister of justice in order to provide a more even playing field between the prosecution and defence at trial. The removal of the lingering restrictions on the ability of defence counsel to fully defend the accused in the *Prisoners Counsel Act* 1836 was a significant and overdue measure in protecting the rights of the accused in the criminal process. However, it is important not to overestimate the effect of the Act. If an accused was unable to afford the services of counsel, as was often the case, then the accused still went into the trial unrepresented<sup>215</sup> (a factor justifying the retention of the notion of prosecution counsel as a minister of justice notwithstanding the *Prisoners Counsel Act*). In the absence of a comprehensive legal aid scheme the rights nominally afforded by the *Prisoners Counsel Act* were an illusion to many defendants in both Australia<sup>216</sup> and England. Bentley’s comment that the absence of a system of criminal legal aid in the 1800s “would remain throughout the century one of the most serious shortcomings of the trial system” is telling.<sup>217</sup> It must also be remembered that the rule preventing the accused from being

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<sup>212</sup> See Langbein (2003), above n 34, 287-288 and Cairns (1998), above n 43, 4 and 54.

<sup>213</sup> Beattie (1991), above n 28, 250-255.

<sup>214</sup> *Ibid*, 253 quoting Parliamentary Debates 4 (1821) 1513.

<sup>215</sup> In the 1840s, for example, in the Black Country only 25% of defendants were legally represented. In serious criminal cases this figure only rose to 49%, see Taylor, above n 130, 114. As late as 1879 a defendant in England charged with murder might still appear unrepresented, see *R v Sherwood* (*The Times*, 5 May 1879). A similar situation also arose in Australia in cases such as *R v Farr* (*Colonial Times*, 6 June 1854), *R v Kenny* (*Colonial Times*, 18 October 1854), *R v Flanders* (*Mercury*, 5 June 1862) and *R v Griffiths* (*Mercury*, 24 and 25 October 1865). Flanders and Griffiths were hanged. The last man hanged for sodomy in Tasmania as late as 1863 was also unrepresented at his trial, see *R v Witnaldar* (*Mercury*, 30 January 1863). It was not uncommon, even into the 20<sup>th</sup> century, to find defendants, even those accused of serious crimes, appearing legally unrepresented. As late as 1910 the Court of Appeal in *R v Gillingham* (1910) 5 Cr App R 187 deemed it necessary to remind judges to ensure defendants charged with rape should be represented by counsel. See also Bentley, above n 158, 113.

<sup>216</sup> Woods notes that as late as the 1880s the NSW legislature chose to focus on issues such as the rights of audience of different legal practitioners and overlooked the “real debate” of how poor accused could even be legally represented, see Woods, above n 171, 350. See also *Ibid*, 340.

<sup>217</sup> Bentley, above n 158, 297. This was only remedied, albeit only in part, in 1903 by the *Poor Persons Defence Act*. Clearly a system of state legal aid for indigent defendants is necessary to promote parity between prosecution and defence, see Ensor, D, *I was a Public Prosecutor* (London, Robert Hale Ltd, 1958) p 169.

legally represented in felonies had already been eroded in practical terms long before the passage of the *Prisoners Counsel Act* by the informal and piecemeal reforms over the preceding century. Defence lawyers were already ordinarily able to do everything in a criminal trial on behalf of the accused except directly address the jury on behalf of the accused<sup>218</sup> (and even this seems to have been sometimes more honoured in the breach than in the observance). Therefore, as Stephen notes of the effect of the *Prisoners Counsel Act*, "The change was less important than it may at first sight seem to have been."<sup>219</sup>

[2.6.6] Nevertheless, the effects of the *Prisoners Counsel Act* should not be lightly dismissed. It was only with the *Prisoners Counsel Act* in 1836 that the defence lawyer was placed on an equal footing as prosecution counsel and gained the full and unrestricted right at both the preliminary examination and at trial to represent the accused. Accordingly it is maintained that the lack of any formal entitlement to full legal representation until 1836 is a strong factor in explaining the development of the role of the prosecuting lawyer as a minister of justice.

### **Part 7: Private Prosecutors and the Lack of a Public Legally Qualified Prosecutor: "a sphere of private animosity, compromise and revenge?"**

[2.7.1] It may come as a surprise to a modern observer to discover that "the public prosecutor was in historical terms a latecomer to criminal trials."<sup>220</sup> In the English criminal process of the 1700s and well into the 1800s the prosecution of alleged offenders was crucially dependent upon the role of the victim or complainant.<sup>221</sup> There was no system of public prosecutions, as such, and with the notable exceptions of "political" or "public" offences such as treason or sedition and offences relating to coinage and currency, the State was content, in accordance with the *laissez faire* philosophy of the period, to leave the enforcement of the criminal law and the prosecution of offenders to private individuals, usually the victim or complainant.<sup>222</sup> As Edwards explains of the absence in England of any organised public body to investigate or prosecute crime:

For many centuries, it must be remembered, the main responsibility rested with the private citizen whose sense of public duty must have been sadly dampened by the realisation that the costs of bringing a criminal to justice had to be met out of his own pocket.<sup>223</sup>

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<sup>218</sup> See Stephen, above n 3, 425.

<sup>219</sup> *Ibid.*

<sup>220</sup> Brown, D, "Failure to call Vital Witnesses in Criminal Trials" (1974) UWA L Rev 374 at 378.

<sup>221</sup> Stephen speculates that the abuses of the State Trials before the 1688 Revolution was the historical cause for the discovery and prosecution of crime being entrusted to the individuals who considered they had been wronged and not to a public prosecutor as in Ireland and Scotland, see Stephen, above n 3, 419. In contrast the system in Australia relied from the outset of British colonisation on public prosecutors. See Chapter 3, n 27.

<sup>222</sup> It is not without irony that while the State could stir itself into action and prosecute on a public basis offences in which it had a direct concern such as treason, sedition or forgery of currency it was blissfully unprepared to prosecute strictly "private" offences such as assault, rape or theft.

<sup>223</sup> Edwards, above n 6, 339. See further Stephen, above n 3, 419 and Beattie (1986), above n 169, 35-36.

[2.7.2] There were undoubtedly conscientious members of the public who regarded the private prosecution of defendants who had allegedly wronged them as a civic duty and undertook this task with a commendable sense of fairness.<sup>224</sup> However, the flaws of such a system of private prosecution were to become increasingly apparent in both the 1700s and 1800s. There was a clear danger in allowing a criminal trial to be pursued by a private prosecutor with purely partisan, malicious or even corrupt motives. Such a partisan prosecutorial agenda could readily clash with the clear view that even the private prosecution of offenders should still be undertaken with restraint and detachment.<sup>225</sup> This had been made plain as early as 1727 in *R v Brown*.<sup>226</sup> The female accused in this case, who appears to have suffered from some form of mental affliction, was charged with theft. The prosecutor seems to have felt strongly about the guilt of the alleged offender. The report of the trial, with evident disapproval, noted:

The Prosecutor was very resolute in her Deposition; and charged the Prisoner with more heat than became her in a Court of Justice; it being the Prosecutor’s Place only to swear to the best of their knowledge, and that too, with Decorum, caution and a calm undisturbed Disposition of Mind, not forward to give their own opinion, but with Reverence submit their own Judgement to that of the Court, who are not to be dictated by a witness, but informed of the Circumstances with relating to the Affair, that Justice may be executed with ease, and a due Regard shewed to those in Authority.<sup>227</sup>

[2.7.3] Though the accused was acquitted, *Brown* provides an early illustration of the dangers that might arise through the vindictive efforts of a private prosecutor. The concern expressed in *Brown* does not seem to have been an isolated theme. In 1783 in *R v Hart*<sup>228</sup> the trial judge rebuked a private prosecutor for a flippant remark that he had directed at the accused during the trial of a capital offence. Such a remark was “not proper nor humane” and “there appears to be a degree of inveteracy in him [the private prosecutor], which is very improper in any prosecutor; for prosecutions ought to be conducted for the sake of Justice alone, with the feelings of humanity.”<sup>229</sup> A scrutiny of both the trial reports in the Old Bailey Session papers and other sources reveals regular incidences of such “inveteracy” during both the 1700s and 1800s by the private prosecutors of the period.<sup>230</sup> The all too regular charges of defence counsel that the private prosecutors were motivated by ulterior considerations were well-founded on

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<sup>224</sup> Some private prosecutors at the Old Bailey proclaimed their intention at trial to be objective and scrupulously fair in their presentation of the case, see *R v Wood & Brown*, Central Criminal Court, 8 December 1784, No T 17841208-2 and *R v Elias*, Central Criminal Court, 25 February 1789, No T 17890225-101.

<sup>225</sup> One must ask whether it is realistic to expect the victim of a crime, who may well have strong views concerning that crime, to pursue the alleged culprit with restraint and objectivity.

<sup>226</sup> 30 August 1727, Central Criminal Court, No: T 17270830-23.

<sup>227</sup> *Ibid.*

<sup>228</sup> Central Criminal Court, 26 February 1783, T 17830226-15.

<sup>229</sup> *Ibid.* Unfortunately, for the accused, as there was a reliable second witness she was convicted of a non-capital crime.

<sup>230</sup> However, it must be noted that many, perhaps the majority, of private prosecutors were not pursuing a vendetta against the accused. Also a common feature of the period was that many aggrieved parties were simply either unwilling or unable to bring a private action. A humane complainant may well have been dissuaded by the harsh sentences of the day that included execution. See Emsley, above n 169, 187. This reluctance added to calls throughout the nineteenth century for a public prosecutor.

occasion.<sup>231</sup> One prosecution counsel, a Mr. Swift, even petitioned in 1787 for a pardon on behalf of a defendant he had just successfully prosecuted, declaring his misfortune at having prosecuted a case where his clients, the private prosecutors, were motivated by "the most rancorous malice and revenge" and volunteering that there were circumstances that rendered the accused an "Object of great compassion."<sup>232</sup> Such cases, far from being unusual, seem to have been commonplace.<sup>233</sup> Such tainted private prosecutors in a system such as England that was dependent on the efforts of private prosecutions posed a real threat to the fairness of any trial. Even the colonial jurisdictions in Australia, which differed from England in largely relying on public prosecutors, were not immune from instances of corrupt or vindictive private prosecutors.<sup>234</sup>

[2.7.4] Contemporary accounts in England of the first half of the nineteenth century, especially in official quarters such as the reports of the Criminal Law Commissioners, record widespread dissatisfaction with the fact that the enforcement of the criminal law depended upon the capricious and far from dispassionate efforts of private prosecutors.<sup>235</sup> Lord Campbell, the Chief Justice of the Kings Bench, in 1845 complained that, "The Criminal Law is often most shamelessly perverted to serve private purposes. Indictments for perjury and conspiracy are in a great majority of cases preferred with a view to extort money; the same for keeping gaming house and brothels."<sup>236</sup>

[2.7.5] Indeed, such widespread dissatisfaction with the system of private prosecution prompted various efforts throughout much of the 1800s in England to remove the victim's responsibility for bringing a case to court and to entrust that task to a public legally qualified prosecutor. As early as 1824 Lord Denman commented of "a strange anomaly in the English criminal system ...the entire want of a responsible public

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<sup>231</sup> For example, one private prosecutor, Mathew Boulton, in 1801 was determined to obtain a death sentence in a prosecution that he undertook of four men who had burgled his factory. Boulton was apparently well satisfied with the efforts of his lawyers in framing a formidable indictment that measured two feet by four and contained eight counts that appeared, in the words of Boulton's son, "to be formed like a swivel gun and may be directed to all points as circumstances require" (see Hay, above n 146, 168). See also Emsley, above n 169, 185.

<sup>232</sup> Swift, T, Letter, July 31, 1787, Public Record Office, HO42/12 fol 98 quoted by Hay, above n 146, 170.

<sup>233</sup> See *R v Innes*, Central Criminal Court, 10 December 1788, No T17881210-52; *R v Burrows*, Central Criminal Court, 15 September 1790, No T 1790915-109; *R v Rowell* (*The Times*, 30 October 1810); *R v Tedder*, (*The Times*, 31 October 1810); *R v Tucker* (*The Times*, 10 November 1810); *R v Thorngate*, Central Criminal Court, 21 April 1819, No T18190421-125; *R v Blackhurst* (*The Times*, 23 August 1823); *R v Barker*, Central Criminal Court, 20 January 1824 (*The Times*, 21 January 1824) and *R v Higgs & Higgs*, Oxford Assizes (*The Times*, 8 March 1824).

<sup>234</sup> See, for example, *R v McDermott* [1841] NSWSupC 101 (*The Australian*, 19 October 1841) and *MacDowell v MacDougall*, Quarter Sessions, 16 November 1841, *Colonial Times*, 23 November 1841.

<sup>235</sup> Apart from vindictive private prosecutors there were other major concerns about the operation of the private prosecution system. These concerns included corrupt prosecutions undertaken as either a thinly disguised means of extortion or of securing rewards (as an incentive for private prosecutors it was customary for the State or private interests to offer rewards for the successful prosecution of an offender), the reluctance and even outright inability of victims to undergo the burden and attendant expense of time, labour and money in the prosecution of offences (even with the allowance of official reimbursement for costs), intimidation, defendants "buying off" either the private prosecutor and /or the evidence of their witnesses, collusion and the mismanagement and general lack of interest in bringing a prosecution. See further Emsley, above n 169, 187-190 and Howard, P, "Criminal Prosecution in England. II. Public Prosecutions" (1930) 30 Col L Rev 12 at 18-20.

<sup>236</sup> Edwards, above n 6, 343, n 31.

prosecutor.”<sup>237</sup> Lord Denman asserted that to leave “the administration of justice in almost every instance to be set in motion by individual feelings of resentment” was “a strange abandonment of the public interest to chance.”<sup>238</sup> Over two decades later Lord Denman, now the Chief Justice of the Court of Kings Bench, reaffirmed this view:

Our procedure for the purpose of the preliminary enquiry is open to great objection. The injured party may be helpless, ignorant, interested, corrupt. He is altogether irresponsible; yet his dealings with the criminal may effectually defeat justice. On general principles, it would evidently be desirable to appoint a public prosecutor and I have little doubt that such an officer might be invested with the necessary powers in such a manner as would be free from all reasonable objection, while it promoted the public interest by insuring the discovery of the truth...<sup>239</sup>

[2.7.6] John Phillimore QC, in introducing a Bill for the establishment of a public prosecutor,<sup>240</sup> was motivated by similar concerns. He commented that the object of his proposed law was “to withdraw from a sphere of private animosity, compromise and revenge that ought never to be left to such chances and to see that justice is properly administered.”<sup>241</sup>

[2.7.7] The need for the prosecuting lawyer to act in the objective spirit of a member of the bar in order to counter-balance the partisan efforts of the private prosecutor was expressed by Bayley J in 1819 in *R v Brice*.<sup>242</sup> In this case the private prosecutor was prevented from addressing the jury and stating the case for the prosecution. Bayley J justified this refusal on the basis that a criminal prosecution was not instituted to “gratify the objects of an individual.”<sup>243</sup> Rather a prosecution was brought in the name of the monarch for the interests of the public. Only counsel was afforded the privilege of addressing the jury as they were under some measure of control of the court and “from their professional education and habits of business, it is to be expected, that they will not state to the jury any thing but what is fit for them to hear.”<sup>244</sup> The prosecuting counsel was expected to act as a judicious filter on the partisan or partial agenda of the private prosecutor. As was later explained by Judge David QC a criminal trial before a jury is not an appropriate forum “to ventilate a personal grievance or pursue a personal vendetta” and should be undertaken with professional discipline and impartiality and “the interests

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<sup>237</sup> Denman, C, “The Edinburgh Review” (1824) Vol xl, 191; quoted in Edwards, above n 6, 340.

<sup>238</sup> Denman, above n 237, quoted in Edwards, above n 6, 341.

<sup>239</sup> Quoted in Howard, P, *Criminal Justice in England: A Study in Law Administration* (Buffalo, William S Hein Co, 1987) p 58, n 11. See also Edwards, above n 6, 343.

<sup>240</sup> The Bill was never passed for various reasons. Such a Bill would ultimately not become law in England until the *Prosecution of Offences Act* 1985 establishing the Crown Prosecution Service.

<sup>241</sup> Quoted in Hostettler (1992), above n 121, 166. See also the similar view of Robert Peel quoted at Radzinowicz, L, *A History of English Criminal Law and its Administration from 1750 (Vol 3): Cross-Currents in the Movement for Reform of the Police* (New York, MacMillan, 1957) p 259, n 2.

<sup>242</sup> (1819) 2 B & Ald 606.

<sup>243</sup> (1819) 2 B & Ald 606.

<sup>244</sup> (1819) 2 B & Ald 606.



of a private prosecutor will more often than not be inimical with those duties and constraints."<sup>245</sup>

[2.7.8] If the private prosecutor was represented at trial by counsel but the accused was not, then the already stark imbalance in the positions of the prosecution and defence would have been further distorted. Not only would the already disadvantaged accused have to face the partisan and potentially partial efforts of a private prosecutor, but he or she would confront the daunting prospect that had so perturbed the hapless accused in *Love* over a century earlier of facing a trained lawyer conducting the prosecution case in the newly adversarial climate. How any such trial could be fair, even in the terms understood by the criminal process of the period, is difficult to conceive. It was bad enough for the legally unrepresented accused that he or she might confront a private prosecutor represented by counsel. But when one additionally takes into account the potentially partisan and partial agenda of the private prosecutor, the manifest inequality between the prosecution and defence becomes not just obvious, but positively dangerous.

[2.7.9] In such a climate it was understandable that the courts in the early 1800s insisted that prosecuting counsel, whether acting on behalf of the State or, more typically, acting on behalf of a private client, should recognise that there were wider considerations at stake than just the interests of his or her client and seeking at all costs to secure the conviction of the accused. One can see the strong incentive at this time to require prosecuting counsel to recognise that he owed a broader duty than simply to advance the cause of his client. To cast the prosecutor as a minister of justice rather than simply as the mouthpiece of a private client was one means of seeking to alleviate the disadvantaged position of the accused in the criminal process. Professor Spencer makes clear in this context the historical rationale for this rule:

Historically, most prosecutions in England and Wales were brought by private persons. Private prosecutors have no reason to act fairly and independently. When Judges at the Bar tried to civilise the criminal procedure in the nineteenth century, part of the deal was imposing a duty to act in a way to cancel out partisan tendencies of private prosecutors...Now that prosecuting is part of the state, that is expected to act fairly during the pre-trial phase, the age of highly partisan prosecutors should in principle be over.<sup>246</sup>

[2.7.10] It may have been hoped that the increasing tendency for prosecutions to be brought either directly by, or on behalf of, the various newly established official police forces as opposed to by or on behalf of the victim or complaint might have curbed any untoward partisan fervour in the presentation of a case. After all, part of the rationale of the establishment of a modern police force in an increasingly industrial and complex urban society in the first half of the nineteenth century was to remove responsibility for enforcement of the criminal law from the subjective and often capricious and less than effective hands of the victim or complainant and entrust it to a new official body that could be trusted to enforce the criminal law without fear or favour and without any

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<sup>245</sup> *R v George Maxwell Ltd* [1980] 2 All ER 99. Judge David also insisted that the private prosecutor in the case before him had to be represented by counsel at the Crown Court if he wished to proceed with his trial.

<sup>246</sup> Spencer J, "Response to Consultation" quoted by Goldsmith, P Lord QC, *Pre-Trial Witness Interviews by Prosecutors Report* (London, Office of the Attorney-General, 2004) p 6.

personal or vested interest in its outcome.<sup>247</sup> However, whether the police brought such an objective and dispassionate tone to the investigation and prosecution of a criminal case was to prove an altogether different proposition.<sup>248</sup>

[2.7.11] The new police forces in England from the mid 1800s gradually came to dominate both the investigation and the prosecution of offences.<sup>249</sup> The hitherto crucial private prosecutor was relegated, perhaps unintentionally, to a secondary and eventually a minor supporting role. The victim largely surrendered his or her hitherto pivotal role in the prosecution of offences and was increasingly rendered a mere passive spectator to the proceedings or, to use a blunt, but not wholly misplaced expression, mere “court fodder” whose role was to provide the initial complaint and to give evidence at trial but otherwise no more.<sup>250</sup> In the absence of a legally qualified public or State prosecutor, it was perhaps inevitable, as Edwards suggests, that the new police forces should come to shoulder both the tasks of law enforcement and the management of the prosecution of any offenders.<sup>251</sup>

[2.7.12] However, from the outset there was disquiet about the lack of dispassion which the police were perceived to bring to their new role in the prosecution of offences, whether appearing as advocates or being concerned with the conduct of the prosecution. In *Webb v Catchlove*<sup>252</sup> the court expressed opposition to the notion of police officers acting as advocates in criminal proceedings. Denman J declared it to be “a most unfortunate practice.”<sup>253</sup> Hawkins J concurred and thought that it was “a very bad practice to allow a policeman to act as an advocate before any tribunal, so that he would have to bring forward only such evidence as he might think fit and keep back any that he

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<sup>247</sup> There had been increasing disquiet for some years about the inadequacies of the existing methods of law enforcement such as relying on the victim to enforce the criminal law and given the widespread concerns in the turbulent aftermath of the Napoleonic Wars about the maintenance of law and order and fears of violent political agitation and a “crime explosion” the climate was conducive to the establishment of a modern style police force, see Taylor, D, *The New Police in nineteenth century England: Crime, Conflict and Control* (Manchester, Manchester University Press, 1997) p 12-43, especially at 18-19 and Lyman, J, “The Metropolitan Police Act of 1829: An Analysis of Certain Events influencing the passage and character of the Metropolitan Police Act (1964) 55 Jour Crim Law 141. See generally Radzinowicz, above n 241, for a full historical account of English policing.

<sup>248</sup> See, for example, Howard’s assertion that the police in their prosecution of suspects “often displayed too great an eagerness to convict” and the accused was not fairly dealt with, see Howard above n 239, 19. Indeed, this is a debate that still holds currency.

<sup>249</sup> See Rozenberg, J, *The Case for the Crown: The Inside Story of the Director of the Public Prosecutions* (Wellingborough, Equation, 1987) p 79, Howard, above n 239, 46-53, and Emsley, above n 169, 190-193. Corns notes that by 1850 the police dominated summary prosecutions in London and throughout England by the end of the 19<sup>th</sup> century (see Corns (2000), Ch 1, n 64, 284-285) and from the 1820s onwards also in Australia (see *Ibid*, 286-287).

<sup>250</sup> With the growth of victim’s rights over the last generation this view has come under increasing challenge. It has even been suggested that the system is now returning to the practice of the 18<sup>th</sup> century. As Fenwick notes, “The emergence of procedural rights for victims may be said to herald a move back towards the position which victims originally occupied within the system. A discernable movement towards a ‘private’ as opposed to a public ordering of the criminal process may currently be occurring.” (Fenwick, H, “Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process” (1997) 60 Mod L Rev 317 at 319).

<sup>251</sup> See Edwards, above n 6, 338; Howard, above n 239, 48 and Corns (2000), Ch 1, n 64, 283-286.

<sup>252</sup> (1886) 3 TLR 169.

<sup>253</sup> (1886) 3 TLR 169 at 170.

might consider likely to tell in favour of any person placed upon his trial."<sup>254</sup> Sir Alexander Cockburn, the Attorney-General, pronounced, as early as 1855, that it was "a great scandal" and "not consistent with the proper administration of public justice... that you should have a subordinate officer, who is merely the keeper of the prisoner, clothing himself with the functions of a public prosecutor."<sup>255</sup> Cockburn considered, foreshadowing a debate that has persisted to the present day, that "policemen should be kept strictly to their functions as policemen, as persons to apprehend and to have custody of prisoners."<sup>256</sup> By involving themselves in the conduct of a prosecution police officers would "acquire a bias infinitely stronger than that which must, under any circumstances naturally attach itself to their evidence."<sup>257</sup> Cockburn explained:

When you get a policeman, you get a minister, though a very subordinate minister of justice and you look upon him as a person upon whom you may therefore rely, and I own that it was not till I became a criminal judge that I saw the necessity of exercising watchfulness over them, without impugning undue motives to them. I see that they take such an interest in the prosecution, by getting credit for the intelligence and energy and skill which they show while getting the witnesses together and bringing them to court and in bringing the prosecution to a successful issue, that I have become very sensibly alive to the necessity of watching their evidence carefully.<sup>258</sup>

[2.7.13] A similar damning appraisal about the role of the police in the prosecution of offenders was offered in the same year by John Phillimore who deplored the absence of a public legally qualified prosecutor:

The Crown, indeed, was the nominal prosecutor but the consequence [of the lack of a public prosecutor] was that we gave to policemen, a class amongst whom were to be found some of the most hardened and profligate of mankind, and over whom the most incessant vigilance was required to prevent flagrant and cruel abuses of their authority, we gave to these men an unlimited power of pardon and connivance; and we entrusted them with an authority which in every country but England was regulated with as much anxiety as the functions of the Judge himself.<sup>259</sup>

[2.7.14] Similar sentiments as to the undesirability of the investigators controlling the prosecution process have continued to be voiced until the present day.<sup>260</sup> However, the fact that the investigators, namely the police in England, and not a public prosecuting lawyer such as a Director of Public Prosecutions, was to control the bulk of prosecutions

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<sup>254</sup> (1886) 3 TLR 169 at 170. See also *Duncan v Toms* (1887) 56 LJMC 81. This debate has persisted to the present day, see further Krone, Ch 1, n 64, 1-2; Corns (2000), Ch 1, n 64, 280-281. See further the discussion in Part 2 of Chapter 1 at [1.2.14].

<sup>255</sup> Edwards, above n 6, 344.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*, 344 at n 37. A similar complaint about the lack of police objectivity was voiced by Pedder CJ in *R v Peck* [1840] TASSupC 3 (*Cornwall Chronicle*, 11 January 1840).

<sup>259</sup> 136 UK Parl Deb (3<sup>rd</sup> ser), col 1651 (1855), quoted by Hay, above n 146, 175.

<sup>260</sup> The undesirability of this is now acknowledged by senior police officers. "I fundamentally believe that there exists a conflict of interest for police to investigate, arrest and prosecute offenders" (see the remarks of Karl O'Callaghan, the West Australian Police Commissioner, quoted by Guest, Ch 1, n 148). See also Corns (2000), Ch 1, n 64, 301; Krone, Ch 1, n 64, 6-8; Rozenberg, above n 249, 83; St John, Ch 1, n 89, 495-499 and Wood, Ch 1, n 152, 296-297. See further the discussions in Part 2 of Chapter 1 at [1.2.14] and Part 4 of Chapter 4 at [4.4.4].

was to cast a shadow over the efficacy and independence of the whole system for the prosecution of offenders. As Rozenberg notes, the role of any prosecuting lawyer in the prosecution of offenders was akin to that of a constitutional monarch. “Like a constitutional monarch, [he or she] had the power to advise and the power to warn, he did not have the power to veto his client’s [the police] instructions.”<sup>261</sup> This situation was to remain until the later part of the 20<sup>th</sup> century.<sup>262</sup> It is possible that the perceived control by the investigators of the prosecution process until comparatively recently (in England at least) may explain why the role of a minister of justice was, far from being questioned with the effective demise of the private prosecutor, reaffirmed in the period after the mid 1800s.<sup>263</sup> The continued imbalance in the positions of the parties (even with the reforms of the 1800s), especially where the accused was unrepresented, also explains this continued adherence to the minister of justice role.<sup>264</sup>

## **Part 8: The English Prosecutor as a Minister of Justice: Loyal, if not Religious Adherence?**

[2.8.1] The English commentator, Sir Showell Rogers, in his 1897 article considered the extent to which prosecuting counsel in England adhered in practice to the notions of professional duty as stated in the various English cases. Rogers, echoing the now accepted wisdom of the period, saw the prosecutor’s role as anything other than a mere advocate and as “a kind of minister of justice filling a quasi-judicial position.”<sup>265</sup> Notwithstanding any potential tension in the dual prosecutorial roles of minister of justice and adversarial advocate, Rogers, reiterating the assurance of the report writer in *Berens* of 30 years previously, was confident that the prosecutor’s paramount duty as a minister of justice was strictly followed:

Any one who has watched the administration of criminal law in this country knows how loyally – one might almost say religiously – this principle is observed in practice. Counsel for the Crown appears to be anything rather than the advocate of the particular private prosecutor who happens to be proceeding in the name of the Crown. When there is no

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<sup>261</sup> Rozenberg, above n 249, 81.

<sup>262</sup> Though a Director of Public Prosecutions was established in England in 1879 the functions of that office remained limited for over a century. It wasn’t until an influential Royal Commission in 1981 following various scandals (see Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (London, HMSO, 1981)) that the distinction between the investigation and prosecution of offences was explicitly recognised. With the resulting *Prosecution of Offences Act* 1985 and the establishment of the CPS, the police finally lost both their control of the prosecution of offences and their rights to appear as advocates in the summary courts. In Australia although the problem has been diminished by the establishment in each jurisdiction of Directors of Public Prosecution the police still generally retain the control and conduct of prosecutions at the summary stage and the right to appear as advocates in the summary courts, see further the discussion in Part 2 of Chapter 1 at [1.2.4].

<sup>263</sup> It may be that the prosecutorial role as an objective minister of justice was deemed necessary to promote the fairness of the criminal trial and to counterbalance the presumed subjective interest in the outcome of the case by the investigator, just as the minister of justice role had been originally designed to help counteract the partisan private prosecutor.

<sup>264</sup> Even today, especially in the summary courts, it is not unusual to find a legally unrepresented defendant, see Chapter 4, n 303. The implications of the prosecutorial role as a minister of justice in such circumstances are considered in Part 11 of Chapter 4 at [4.11.8].

<sup>265</sup> Rogers, Ch 1, n 170, 259.

private prosecutor, and the proceedings are in the most literal sense instituted by the Crown itself, the duty of prosecuting counsel in this respect is even more strictly to be performed.<sup>266</sup>

[2.8.2] However, Rogers' confidence could prove misplaced in practice. It is clear on occasion that partisan prosecutors still existed<sup>267</sup> who acted in the manner of Mr. Alderson in *Vaughan* and ignored any duty of restraint and moderation.<sup>268</sup> The celebrated case of *Courvoisier*<sup>269</sup> is especially notable in this respect. The accused in that case appears to have suffered from a double misfortune in the eyes of the prosecution. He was both a foreigner (he was Swiss) and had been charged with the murder of his eminent aristocratic employer, Lord Russell, who had been killed during the course of a robbery of his rooms. The prosecution counsel, Mr. Adolphus, was seemingly convinced of the defendant's guilt but was aware that the Crown's case was far from watertight.<sup>270</sup> Adolphus was "an advocate of great ability and experience, but a career spent in the prosecution of criminals had made him somewhat too eager for convictions."<sup>271</sup> Atlay notes that some of Adolphus's observations in his robust opening address to the jury "certainly outstripped the province of prosecuting counsel."<sup>272</sup> Of particular notoriety was his contention that Courvoisier had to be guilty because as a foreigner he must have believed that English aristocrats carried around vast sums of gold and foreigners always killed their victim as a prelude to robbery. "It was therefore a natural supposition that the murder was committed by the prisoner."<sup>273</sup>

[2.8.3] It is quite possible that the prosecutorial zeal shown in *Courvoisier* is explicable by the need for the Crown to make an example of a defendant who had so obviously challenged the established social order.<sup>274</sup> In this sense *Courvoisier* is comparable to similar instances in both England<sup>275</sup> and Australia<sup>276</sup> during this period where

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<sup>266</sup> *Ibid*, 259-260. See also Stephen, above n 3, 429 and 492.

<sup>267</sup> Partisan prosecutors could also be found in Australia during this period, see further the discussion in Part 5 of Chapter 3.

<sup>268</sup> See, for example, the scathing comments in Editorial, *The Times*, 4 November 1834, p 2, about the nature of the advocates who practised at the Old Bailey and their style of advocacy. See also Cairns, (2002), above n 92, 445 (reference to the "virulent public controversy" at the perceived "excessively adversarial advocacy" of the 1840s and 1850s) and Hostettler (2006), above n 28, 135.

<sup>269</sup> Central Criminal Court, 18, 19 and 20 June 1840, No T18400615-1629. See further Atlay, J, *Famous Trials of the Century* (London, Grant Richards, 1899) p 44-63 and "The Trial of Francois Benjamin Courvoisier for the Murder of Lord William Russell" in Townsend, W, *Modern State Trials* (London; Longman, Brown, Green and Longman, 1850) p 244-312.

<sup>270</sup> Atlay, above n 269, 50.

<sup>271</sup> *Ibid*.

<sup>272</sup> *Ibid*. See also Cairns, (1998), above n 43, 129-130.

<sup>273</sup> *Ibid*, 129, n 4. See also Atlay, above n 269, 51 and Tudor Price, D, "Treasury Counsel at the Old Bailey: Past, Present and Future" [1985] Crim LR 471 at 473. The opening address of prosecution counsel is reported in full in *The Times*, 19 June 1840 and the *Sydney Gazette*, 24 October 1840, p 4.

<sup>274</sup> It is significant that the trial was observed by a veritable "Who's Who" of the British establishment, see Cairns (1998), above n 43, 129.

<sup>275</sup> See also *R v Eyres*, Central Criminal Court, 9 January 1799, No 179970111-5 (murder during a "very outrageous riot" when a "very outrageous mob" attacked a police office at which the Magistrates were in attendance); *R v Edmonds & Ors*, Warwick Assizes (*The Times*, 5 August 1820) (robust prosecution in a sedition

prosecution counsel proved similarly zealous in confronting defendants who could be perceived as “enemies of society” in that their crimes were seen as challenging the established order. It is significant though that the research undertaken for this Thesis suggests that this trend was far more pronounced in Australia than in England.

[2.8.4] *Courvoisier* was to prove by no means unique in England as an example of prosecutorial zeal at odds with any notion of professional restraint. Such cases continue to be found well into the first part of the 20<sup>th</sup> century. Patrick Hastings KC in 1949 remarked upon the combative style of prosecution advocacy that had been widespread earlier in that century when it was “not unknown [for prosecution counsel] to strive every effort and to utilise all the arts of advocacy in order to obtain a conviction.”<sup>277</sup> Chandos in 1921 described in similar terms the prevailing “win at all costs” culture that then existed at the Central Criminal Court:

...whatever the technical attitude of the Law, it was the responsibility of the Accused [at the Central Criminal Court] to prove himself innocent. This atmosphere was nourished by the Chief Treasury Counsel. Dickie Muir<sup>278</sup> was classically thorough in the preparation of a case, but he suffered from a constitutional disposition to seeing a man in the dock leave it by any route other than down the stairs leading down to the cells. He would gladly, it was said in the Criminal Bar Mess, have prosecuted his grandmother, if a case could have been got on its facts against her.<sup>279</sup>

[2.8.5] This “old school”<sup>280</sup> style prosecution advocacy is reflected in the complaint in 1916 of defence counsel in *R v Banks*<sup>281</sup> to the Court of Appeal of the “growing tendency for counsel for the prosecution to conduct cases as advocates rather than as ministers of justice.”<sup>282</sup> In this case the accused had been convicted at trial of unlawful carnal knowledge of a fourteen year old girl. The accused had claimed that he had thought that the victim was over sixteen. In his closing address prosecution counsel had exhorted the jury “to protect young girls from men like the prisoner.”<sup>283</sup> Defence counsel asserted that

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trial arising from a political protest) and *R v Wakefield & Wakefield* (*The Times*, 26 March 1827, p 2, 3 and 4) (robust prosecution of two men accused of the abduction and coerced marriage of an underage heiress).

<sup>276</sup> See further the discussion in Part 5 of Chapter 3.

<sup>277</sup> Hastings, P, *Cases in Court* (London, William Heinemann Ltd, 1949) p 331.

<sup>278</sup> Sir Richard Muir, Senior Treasury Counsel at the Central Criminal Court. See further Felstead, S, *Sir Richard Muir: a Memoir of a Public Prosecutor* (London, John Lane, 1927).

<sup>279</sup> Chandos, J, *Norman Birkett: Uncommon Advocate* (London, Mayflower Books Ltd, 1963) p 40-41. Chandos recites a conversation at the Old Bailey of someone asking where Muir was. The answer was Muir had gone home not feeling well as the defendant he had been prosecuting had been acquitted, see *Ibid*, 41. Muir was clearly a formidable prosecutor (see Felstead, above n 278, 5) but even the author of his approved autobiography acknowledged that Muir “achieved the reputation of being a man who never permitted his feelings to err on the side of the mercy.” *Ibid*. Norman Birkett, a prosecutorial colleague of Muir known for his fairness (see Ensor, above n 217, 169) was less diplomatic and described Muir as “a silly, pompous, self-opinionated, vain, hard, emotionless, despicable ass” (Montgomery-Hyde, H, *Norman Birkett: The Life of Lord Birkett of Ulverston* (London, Hamish Hamilton, 1964) p 98. See also Tudor Price, above n 273, 473.

<sup>280</sup> Hastings, above n 277, 232.

<sup>281</sup> [1916] 2 KB 621.

<sup>282</sup> [1916] 2 KB 621 at 622.

<sup>283</sup> [1916] 2 KB 621 at 622.

such an exhortation was misplaced and "counsel ought not to struggle to obtain a conviction."<sup>284</sup> The Court of Appeal agreed. Though the remark was not such an actual irregularity in the proceedings as to result in the quashing of the conviction, Avory J accepted that the prosecutor's comment may not have been in good taste or strictly in accordance with the proper character of prosecution counsel. His Lordship quoted *Puddick* with approval and observed, "It is true that prosecuting counsel ought not to press for a conviction... they should 'regard themselves' rather as 'ministers of justice' assisting in its administration than as advocates."<sup>285</sup>

[2.8.6] Even though, as defence counsel's complaint in *Banks* might suggest, prosecution counsel in England might succumb to adversarial temptation,<sup>286</sup> it is clear that the courts would not tolerate any return to the style of the prosecutor as a partisan or passionate advocate. This was made plain in *R v House*<sup>287</sup> in 1921 and *R v Sugarman*<sup>288</sup> in 1935. In *House* prosecution counsel resorted in his closing address to a tirade of anti-Semitic invective<sup>289</sup> against a Jewish defendant who had lived in England for 23 years. The accused was charged with the theft of £116 from a seaman who had been boarding with him. On appeal the defence complained about the unfair conduct of the Crown case and asserted that the prosecutor had appealed to the "religious prejudice" of the jury and had "attempted to inflame their minds."<sup>290</sup> The Court of Appeal agreed and described the language of prosecution counsel as "highly improper"<sup>291</sup> and stated that it ought to have been checked at the time by the trial judge.<sup>292</sup> The appeal was allowed and House's conviction was quashed.<sup>293</sup> In *Sugarman* the court disapproved of prosecution counsel's

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<sup>284</sup> [1916] 2 KB 621 at 622.

<sup>285</sup> [1916] 2 KB 621 at 623.

<sup>286</sup> See the unrestrained language and/or partisan style employed by the prosecution lawyer in such cases as *R v Wallace* (Liverpool Spring Assizes, 22 April 1931 recited in Wyndham-Brown, W, *The Trial of Williams Herbert Wallace* (London, Victor Gollancz, 1933) p 53-82, especially 82) (a "murder foul and unpardonable" (*Ibid*)); *R v Barnes & Ors* (Warwick Assizes, 11 December 1939 recited in Fairfield, L, *The Trial of Peter Barnes and Others (The IRA Coventry Explosion of 1939)* (London, William Hodge & Co, 1953)) (an IRA terrorist bomb that killed five people) *Zeuss & Ors* (see Webb, A, *The Natweiler Trial* (London, William Hodge and Co, 1949) (the trial of several alleged German war criminals in 1946) and *R v Ward* (Central Criminal Court, 22 July 1963 described in Kennedy, L, *The Trial of Stephen Ward* (London, Penguin Books, 1964) p 21-23 (living on immoral earnings arising from a political scandal).

<sup>287</sup> (1921) 16 Cr App R 49.

<sup>288</sup> (1935) 25 Cr App R 109.

<sup>289</sup> This had included such remarks as: "This is a clear case of the despoiling of the Egyptians by the Israelites"; "our British seamen falling into the hands of these sharks;" "now they have got Palestine or Mesopotamia they are not satisfied;" "these brutes, these people coming from nowhere, robbing our British subjects" and "this man living between Palestine and Leicester Square." (1921) 16 Cr App R 49 at 50-51.

<sup>290</sup> (1921) 16 Cr App R 49 at 51.

<sup>291</sup> (1921) 16 Cr App R 49 at 51.

<sup>292</sup> (1921) 16 Cr App R 49 at 51.

<sup>293</sup> Such a conclusion is unsurprising. Even by the standards of 1921 the language of prosecution counsel at the trial was wholly objectionable. See also such modern decisions in England as *R v Gonez* [1999] All ER (D) 674 and *R v Benedetto & Labrador* [2003] 2 Cr App R 25 where similar objectionable references of a religious or national nature were also made by prosecution counsel.

robust cross-examination of the accused at trial for handling stolen goods.<sup>294</sup> The court declared:

It cannot too often be made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law.<sup>295</sup>

[2.8.7] If the prosecutor were to depart from this duty then he or she risked any conviction that had been obtained at trial being quashed on appeal. The Lord Chief Justice, drawing on earlier authority,<sup>296</sup> emphasised the necessity for any accused person to receive a fair trial.

[2.8.8] By the middle part of the 20<sup>th</sup> century cases such as *Banks, House* and *Sugarman* appear to have firmly registered on the application of the prosecutorial role. Even a renowned English prosecutor such as Christmas Humphreys<sup>297</sup> disavowed any notion that the prosecuting lawyer should measure his or her success through the securing of a conviction. “Always the principle holds,” Humphreys declared, “Crown counsel is concerned with justice first, justice second, and a conviction a very bad third.”<sup>298</sup> Hastings supports this view and describes the prosecution of a Polish officer during the Second World War for the murder of a romantic rival<sup>299</sup> that illustrates the culture of prosecutorial moderation that had taken hold. Unlike other cases earlier in the century Hastings notes:

The case for the prosecution was outlined by senior counsel for the Treasury, and in accordance with a tradition which in recent years has become universal in our criminal courts, it was presented with absolute fairness, the strong points against the prisoner were properly brought to light, while at the same time the evidence or arguments which might tend to assist him in his defence were placed frankly before the Court. There was nothing either in the opening statement or in the evidence for the prosecution which could possibly have taken the prisoner by surprise. The facts which we had foreseen were placed before the Court neither more or less forcibly than we had anticipated.<sup>300</sup>

[2.8.9] Whatever may have been the perception and practice of the prosecutorial role in the period before the early 1800’s it is clear that during the nineteenth century the fundamental premise of the prosecutor’s duty as a minister of justice, and not as a

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<sup>294</sup> Prosecution counsel had cross-examined the accused by suggesting that he had received stolen property other than that charged in the indictment. This reasoning was criticised by the Court of Appeal (1936) 25 Cr App R 109 at 114 as it was seemingly calculated to lead the jury to believe that the accused was the sort of person who was more likely to have committed that kind of offence.

<sup>295</sup> (1936) 25 Cr App R 109 at 114-115.

<sup>296</sup> See *Maxwell v DPP* (1934) 24 Cr App R 152 at 176.

<sup>297</sup> See Chapter 1, n 2.

<sup>298</sup> Humphreys, Ch 1 n 1, 746.

<sup>299</sup> The prosecution alleged that he had murdered a man that his wife had been having an affair with.

<sup>300</sup> Hastings, above n 277, 287. Hastings observed that “the days of flatulent oratory are gone” (*Ibid*, 159).



partisan advocate, became firmly established. There seem to have been few dissenting voices to this concept of the prosecutorial role.<sup>301</sup> Any potential tensions and limitations of the concept of the restrained minister of justice acting within an adversarial criminal justice system (as raised at the outset of this Chapter) appear to have gone largely unnoticed. Lord Devlin was able in 1958 to declare that, unlike earlier in the century, it was "now well established" that the prosecution lawyer "is to act as a minister of justice rather than as an advocate, he is not to press for a conviction but is to lay all the facts, those that tell for the prisoner as well as those that tell against him, before the jury."<sup>302</sup>

### **Part 9: An Overlooked Question Raised By the Emergence of the Minister of Justice Role in the New Adversarial System: Irreconcilable Tensions?**

[2.9.1] Having regard to the criminal justice system and wider society of the late 1700s and early 1800s, the development in the nineteenth century of the notion of the prosecutorial role as a minister of justice is understandable, both as to when and why this role evolved. However, the emergence of the minister of justice role in the 1800s raises a number of questions.

[2.9.2] The emergence in the late 1700s and early 1800s of an increasingly adversarial criminal process raises a fundamental question as to the role of the prosecuting lawyer in such a process. The traditional premise of the adversarial system is that the justice and the truth of the matters in dispute will best emerge from the fray of a vigorous and partisan contest between two opposing parties.<sup>303</sup> As was observed by Smith as early as 1824 when he provided the following definition of the design and purpose of an adversarial system:<sup>304</sup>

Justice is found, experimentally, to be effectually promoted by the opposite efforts of practised and ingenious men presenting to an impartial judge the best arguments for the establishment or explanation of truth. It becomes then, under such an arrangement, the decided duty of an advocate to use all the arguments in his power to defend the cause he has adopted, and to leave the effects of those arguments to the judgment of others.<sup>305</sup>

[2.9.3] If the wisdom of an adversarial system was, and still is, that truth and justice are ultimately best able to emerge from the conflict of a partisan contest between two

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<sup>301</sup> Some modern commentators have questioned the minister of justice role, see Shapray, Ch 1, n 21, 125-126, Zellick, above n 31, 493 and Grossman, Ch 1, n 249, 348-349. See further the discussions in Part 6 of Chapter 4 at [4.6.1]-[4.6.2] and Part 11 of Chapter 4.

<sup>302</sup> Devlin, P, *The Criminal Prosecution in England* (New Haven, Yale University Press, 1958), p 27.

<sup>303</sup> See, for example, Grosman, B, *The Prosecutor: An Inquiry into the Exercise of Discretion* (Toronto, University of Toronto Press) p 83 and Hooper, A, "Discovery in Criminal Cases" (1972) 1 Can B Rev 445 at 452-454. See also the earlier discussion in Part 1 of Chapter 1 at [1.1.9].

<sup>304</sup> This observation was made in the course of a church sermon (Smith was a clergyman) before Baron Hullock and Justice Bayley. The title of the sermon was, perhaps ominously for all lawyers, "The Lawyer that tempted Christ."

<sup>305</sup> Smith, S, quoted by Rogers, Ch 1, n 170, 263. It is unsurprising to find, even as early as 1824, such an expression of faith in the superiority of the adversarial system. Lord Eldon had remarked in 1822 in *Ex parte Lloyd* (1830) Mont 70 at 72n "that truth is best discovered by powerful statements on both sides of the question."

opposing and evenly matched parties,<sup>306</sup> one must ask how such a system is to function on this basis and achieve its stated goals when the prosecutor is cast in the role of an impartial figure of restraint. The defence are entitled and expected in an adversarial system to defend fearlessly the interests of the accused and to take any legitimate measure to fulfil that role.<sup>307</sup> But if the prosecutor assumes the lesser role of a minister of justice then it is difficult to see how the adversarial process can achieve its stated aim of discovering or establishing the truth of the case when there is this apparent uneven playing field. “If the adversarial system is to work, the combatants must be kept equal or at least relatively equal.”<sup>308</sup> If one side is in a much stronger position than that of the other then, as Grosman, asserts, the adversarial system is undermined and “the outcome is determined simply by superior power.”<sup>309</sup> The development of the prosecutorial role as a minister of justice in the emerging adversarial system of the 1800s raises the issue of how this role was to be reconciled within an adversarial process that is premised on the basis of a vigorous contest between two opposing parties.

[2.9.4] This apparent conflict in prosecutorial roles does not seem to have been noted by contemporary observers in the early nineteenth century, and was largely unaddressed throughout the entire nineteenth century, and beyond as will be explored in Chapter 4.<sup>310</sup> I would suggest that this tension lies at the heart of the prosecutor’s role in the criminal process. As was noted, in the context of the emerging adversarial criminal process of the nineteenth century, by Sutherland, a Canadian lawyer:

One might well ask how nineteenth-century lawyers and judges reconciled the non-adversarial role of prosecuting counsel with the adversarial trial of criminal charges. After all the adversarial system is based on the premise that justice is most likely to be achieved through the coming together in a controlled setting of opposing parties, each represented by a skilled advocate whose sole duty is to advance the position of his or her client. How can anyone have thought that this method of trial could properly work if one of the parties is *not* [my emphasis] obliged to act as an advocate.<sup>311</sup>

[2.9.5] Sutherland raises a powerful argument.<sup>312</sup> Given the apparent conflict in prosecutorial roles he identifies, it is not entirely surprising during the early nineteenth century when the adversarial trial was comparatively in its infancy to find a number of

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<sup>306</sup> This premise does not command universal support. For an opposing view see Frank, J, *Courts on Trial: Myth and Reality in American Justice* (Princeton, Princeton University Press, 1949) p 80-102 (especially 85) and Ipp, D Justice, “Reforms to the Adversarial Process in Civil Litigation: Part 1” (1995) 69 ALJ 705 at 713-715. See further the discussion Part 1 of Chapter 1 at [1.1.9], especially Chapter 1, n 33.

<sup>307</sup> See also the discussion in Part 3 of Chapter 1 at [1.3.3].

<sup>308</sup> Grosman, above n 303, 84. See also *R v Dietrich* (1992) 177 CLR 292 at 354 per Toohey J.

<sup>309</sup> Grosman, above n 303, 84.

<sup>310</sup> This tension has often escaped close scrutiny but has not gone totally unnoticed, see Turner, above n 22, 458-459. The modern implications of this continuing tension in prosecutorial roles will be considered in Chapter 4.

<sup>311</sup> Sutherland, above n 88, 152.

<sup>312</sup> Indeed, I would suggest that in light of cases such as *R v Livermore* (2006) 67 NSWLR 659 and *R v MG* (2007) 69 NSWLR 20, as will be discussed in Part 4 of Chapter 4, this tension in prosecutorial roles remains equally, if not even more, pertinent to the present day.

notable cases in both England<sup>313</sup> and Australia,<sup>314</sup> where the prosecuting lawyer discarded any notion of restraint and acted as a partisan advocate whose role appears to have been confined to seeking the conviction of the accused. After all, it could be argued that no advocate can serve two masters. How could the prosecutor assume the mantle of both a judicious minister of justice and an active partisan advocate within an adversarial process at the same time?

[2.9.6] The tension in prosecutorial roles is reflected as early as 1787 in the course of the opening address to the jury by Garrow as prosecution counsel in *R v Radbourne*<sup>315</sup> during the trial of a servant for murder and petit treason in respect of the death of her employer:

Gentlemen, the situation of an advocate on an occasion like this, is a very painful one; we owe duties which are difficult to discharge; we owe a duty to the suffering individual [victim] and their relations; we owe a duty to the public; who are interested that the guilty party should be brought to exemplary punishment; but we have other duties which stand in an opposite direction, we owe a duty of humanity and compassion to the unfortunate prisoners against whom we appear, and there is no man in this court that will feel a more sensible satisfaction at a verdict of acquittal, than I shall on this occasion, and on all occasions when the guilt of the party appears at all doubtful; but if you, Gentlemen, are fully satisfied in this case of the guilt of this wretched woman at the bar it will be your duty to declare her guilty by your verdict. If you have any doubt upon this case, I am sure your own humane minds will lead you to acquit her...<sup>316</sup>

[2.9.7] Such reference to the tension in the prosecutorial roles of minister of justice and active advocate within the newly adversarial criminal process is by no means unique.<sup>317</sup> Recognition of the tension in prosecutorial roles is also manifest in 1823 in *R v Jephson*<sup>318</sup> in the opening address of prosecution counsel, a Mr. Pryme, at Cambridge Assizes during a trial for alleged sexual offences of an "unnatural" nature. The tension in prosecutorial roles in *Jephson* appears compounded by the fact that the accused was a resident fellow and tutor at St Johns College at Cambridge University. Mr. Pryme was compelled to confess, not only his reluctance to prosecute such a respectable individual "who had maintained an exalted station in society," but the fact that it was "particularly unpleasant" for him to have to prosecute a defendant whom he was personally acquainted with and who was a member of the university at which they both resided.<sup>319</sup> Nevertheless, "extremely disagreeable"<sup>320</sup> as his duty was, he was fully prepared to discharge his duty

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<sup>313</sup> See, for example, *R v Vaughan*, *The Times*, 14 August 1828, and *R v Coirvoisier*. See also the cases noted above at n 111 and n 275.

<sup>314</sup> This issue and the reasons for such a prosecutorial approach in Australia will be considered in Chapter 3.

<sup>315</sup> Central Criminal Court, 11 July 1787, No T17870711-1.

<sup>316</sup> *R v Radbourne*, Central Criminal Court, 11 July 1787, No T17870711-1. It will be observed that not only is Garrow conscious of the tension of the minister of justice and adversarial roles but he is also aware of the additional tension caused by the interests of the victim.

<sup>317</sup> This tension is seen even earlier in such cases as *R v Vandercorn & Abbott*, 13 January 1796, Central Criminal Court, No T 17960113-27. See also May, above n 33, 99-100.

<sup>318</sup> Cambridge Assizes, 23 July 1823 (*The Times*, 25 July 1823).

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.*

as prosecution counsel. But what was his duty? Mr. Pryme defined his role in the following terms:

But in a case of this, or indeed of any sort, where a brief was put in the hands of a counsel, it became his duty to state the case clearly and fully, utterly disregarding all adventitious circumstances. He trusted that he should so conduct himself: and while on the one hand he, for the sake of public justice, brought forward the charge without harshness, he hoped, on the other, he should leave nothing undone which it was the duty of a counsel to do.<sup>321</sup>

[2.9.8] The fact that Mr. Pryme, unlike prosecutors of the period in Australia in their prosecution of “respectable” defendants,<sup>322</sup> did not neglect the “adversarial” side of his duty in prosecuting a fellow “gentleman” is borne out by the comment of defence counsel in his closing address that Mr. Pryme had spent two hours in his opening address in an “eloquent and elaborate address laying before the court everything that could operate against the defendant.”<sup>323</sup>

[2.9.9] Another manifestation of this apparent tension in prosecutorial roles can be found in the closing comments of the Attorney-General in the leading case of *R v Palmer* in 1855. The defence counsel, Sergeant Shee, at trial had declared his personal conviction of the innocence of the defendant.<sup>324</sup> The Attorney-General in his closing address responded in the following terms:

I feel that I have a solemn and important duty to perform. I wish that I could have answered the appeal made to me the other day by my learned friend, Sergeant Shee, and say that I am satisfied with the case which he submitted to you for the defence; but standing here as the instrument of public justice, I feel that I should be wanting in my duty I have to perform if I did not revert to my original position, and again solicit at your what I hope, I may term a spirit of fairness and moderation. My business is to convince you, if I can, by facts and legitimate arguments, of the prisoner’s guilt: and if I cannot establish it to your satisfaction, no man will rejoice more than I shall in a verdict of acquittal.<sup>325</sup>

It is significant that this tension in prosecutorial roles was not confined to England but was also manifest on occasion in Australia<sup>326</sup> and Canada.<sup>327</sup>

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<sup>321</sup> *Ibid.*

<sup>322</sup> The manner in which Mr. Pryme prosecuted a “respectable” individual in *Jephson* should be contrasted with the almost supine manner in which prosecution counsel in Australia on occasion in the first half of the 1800s prosecuted similar “respectable” defendants. See further the discussion in Part 4 of Chapter 3.

<sup>323</sup> *Ibid.* See also the similar case of *R v Seymour & Macklin*, Salisbury Assizes, 12 and 14 March 1828 (*The Times*, 14 and 17 March 1828), where prosecution counsel did not flinch in the prosecution of a “gentleman of rank, fortune and education” (*The Times*, 14 March, 1828, p 4) accused of an “unnatural” act with his footman.

<sup>324</sup> Both the trial judge and the Attorney-General had remarked that such personal expressions by counsel were inappropriate and irrelevant. This position has remained to the present day, see *R v MG* (2007) 69 NSWLR 20.

<sup>325</sup> Central Criminal Court, above n 75, 142.

<sup>326</sup> See, for example, *R v Kilmeister & Ors* (No 2) [1838] NSWSupC 110 (*The Australian*, 1 December 1838 and *Sydney Gazette*, 1 December 1838). During the trial of a number of white men for the murder of 28 Aborigines in the notorious Myall Creek murder case, Joseph Plunkett, the Attorney-General, declared in his opening address: “It could not be conceded, as it had already been disclosed in evidence, that twenty eight human beings lost their lives in a manner which was sufficient to move the most hardened and obdurate heart; it was not his intention, nor

[2.9.10] Notwithstanding the efforts of Garrow, Pryme and the Attorney-General in defining their prosecutorial duty to reconcile both the "adversarial" and minister of justice aspects of their function, it is by no means clear that the potential tension in prosecutorial roles is capable of such simple reconciliation. However, it is likely in practice in the 1800s that this tension was not acute. It is arguable that the criminal process of the nineteenth century was in practice, with the exception of cases such as *Palmer*, not "truly adversarial" in that there was still no genuine contest of equals between the prosecution and the defence.<sup>328</sup> As May argues, the theory and practice of nineteenth century "adversarialism" diverged.<sup>329</sup> Despite the increasingly "adversarial" nature in theory of the process, there was still no true equality between the prosecution and the defence and therefore the continued rationale of the prosecutorial role as a minister of justice to alleviate the defendant's continued disadvantaged position is understandable. Though the defendant's position improved during the course of the 1800s it is clear that the accused was to remain in a position of notable inequality with the prosecution until well into the 20<sup>th</sup> century.<sup>330</sup>

[2.9.11] However, it is significant that the prosecutorial role as a minister of justice did not undergo any review or reconsideration as the imbalance between the positions of prosecution and defendant was progressively reduced during the 1900s and the English criminal process became increasingly "adversarial," in both form and substance, and became far more of a true contest of equals.<sup>331</sup> The apparent tensions in the prosecutorial roles of both minister of justice and adversarial advocate remained largely unnoticed and certainly unresolved. This issue will be considered further in Chapter 4.

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was it his wish to bias them against the prisoners, now put on their trial, but it was his duty as well as his custom to bring before them the enormity of the crime, and to paint it in its most debasing colours. The vengeance of the law only fell upon the guilty, and if the crime now imputed against the prisoners was not brought home to them by the clearest evidence, he did not expect a verdict at their hands, nor did the law expect it." (*The Australian*, 1 December 1838). For the background to this case see further Miles, R, *Waterloo Creek: The Australia Day Massacre of 1838 and George Gipps and the British Conquest of New South Wales* (Ringwood, Penguin Books, 1992) p 504-607.

<sup>327</sup> See, for example, *R v Riel* in Canada in 1885 when during a famous treason trial prosecution counsel concluded his closing address in the following terms: "Now, gentlemen, the Crown in this case has a double duty to perform. In the first place, to see that the prisoner has had every impartiality and fair play and every consideration which it was in their power to give him, and which the law afforded him. Let there be no mistake about that. If this fair play has not been granted, if this trial has not been impartial, if we have omitted any part of our duty, all I can say is that the prisoner's life has been in our hands quite as much as in the hands of the learned gentlemen for the defence. But, gentlemen, we have another duty to perform; we have the cause of public justice entrusted to our hands; we have the duty of seeing that the cause of public justice is properly served, that justice is done." See the transcript of counsels' addresses available at: [http://www.law.umkc.edu/faculty/projects/ftrials/riel/crown\\_address.html](http://www.law.umkc.edu/faculty/projects/ftrials/riel/crown_address.html).

<sup>328</sup> May notes the absence of public prosecutors and a DPP, the absence of legal aid and the fact that most defendants could not afford counsel, see May, above n 33, 200. See also Bentley, above n 158, 297-301.

<sup>329</sup> *Ibid.*

<sup>330</sup> Such developments as the defendant's right to give evidence, a comprehensive power of appeal if convicted, the ascendancy of "public" prosecutions, the availability of state funded legal representation and most recently the development of the prosecution's duty of comprehensive disclosure all improved the situation of the accused.

<sup>331</sup> Indeed, as has been seen by cases such as *R v Banks* [1916] 2 KB 621, *R v House* (1921) 16 Cr App R 49 and *R v Sugarman* (1935) 25 Cr App R 109 at 114 the minister of justice role was emphatically confirmed.

## Part 10: Other Implications of the Minister of Justice Role

[2.10.1] The development and application of the prosecutorial role as a minister of justice in England raises other important issues, namely the overlooked question of how the role of the prosecuting lawyer applied within the very different context of the Australian jurisdictions in the nineteenth century.<sup>332</sup> If the development of the prosecutor’s role in England is explicable by both the transformation to an adversarial system of criminal justice at the close of the 1700s and early 1800s and also by the wider disadvantaged position of the accused within that criminal process, then was the English prosecutorial model of a minister of justice to apply unchanged in Australia, as precedent and custom might suggest, or was a distinctly Australian prosecutorial model reflecting local circumstances and conditions to evolve? This issue will be considered in Chapter 3.

[2.10.2] It might be argued that the prosecutorial role as a minister of justice outlived its original rationale as the position of the accused improved during the course of the nineteenth century. If the minister of justice role had been originally considered necessary to help alleviate the unequal position of the accused at the time in the criminal process, it is arguable that the prosecutorial role could have been refined or reconsidered as the legal system became more truly “adversarial” in both form and substance and the criminal trial became increasingly a genuine contest of equals. The accused was no longer engaged in a race with the Crown where the odds were as heavily stacked against him or her as had been the situation at the start of the nineteenth century.<sup>333</sup> This raises the question of whether a prosecutorial role that evolved in the distinctive circumstances of early nineteenth century England was capable of extension and application to either the different circumstances of other nineteenth century jurisdictions such as Australia or alternatively remains applicable in the vastly changed circumstances of modern Australia and England where by no stretch of the imagination can the position of the typical accused be compared with that of the typical accused in England of the early 1800s.<sup>334</sup> This question and the continued application of the prosecutorial role as a minister in the modern Australian and English criminal process will be considered further in Chapter 4.

[2.10.3] And finally there is the “fundamental defect” suggested by Hostettler as discussed earlier. This is the need to ensure that all significant evidence or other material is brought before the court of trial or is at least made known to the defence.<sup>335</sup> This issue was left unresolved by the changes and reforms to the criminal process of the nineteenth

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<sup>332</sup> Most previous historical scrutiny in this area by scholars such as Langbein, Beattie, Cairns, May, Hostettler, Hay, Emsley, Taylor and Bentley has been confined to legal developments in England as opposed to Australia.

<sup>333</sup> See Auld, R, *Review of the Criminal Courts of England and Wales* (London, HMSO, 2001) Ch 11 at [95]. See further the discussion in Part 10 of Chapter 4.

<sup>334</sup> It must be acknowledged that the modern accused enjoys a wide range of rights that would have been sadly lacking to any accused of the early 1800s. However, it is noteworthy that some English observers have argued that the many legislative “reforms” of recent years have led to a steady erosion in the protections accorded to an accused and have had the effect of drastically weakening his or her position within the legal process, see Sanders and Young, Ch 1, n 27, 21 and Bentley, above n 158, 300-301. Indeed, Bentley asserts that the legislative changes of recent years such as the virtual abolition of committal proceedings and the removal of the corroboration rule have so weakened the status of the accused that “if present trends continue we may yet come to look upon it [the 1800s] ...as a golden age.” (*Ibid*, 301).

<sup>335</sup> Hostettler (1992), above n 121, 148.

century. In fact, as Hostettler argues, the growth of the adversarial system and the conferring of full legal representation on the accused far from alleviating this problem, may even have served to compound it:

Nonetheless, despite the profound effect this change [to the adversarial system and the control of the criminal trial by the lawyers] had, it did nothing to solve the fundamental defect of English criminal procedure that there was no machinery for bringing before the court the whole of the evidence which was really available. Indeed, the progress of lawyers in the courts, merely made the position worse. Evidence and witnesses were, and still are frequently withheld by lawyers for both parties for various reasons and although this might be wise in the interests of their clients, it is clearly not necessarily in the interests of truth and justice. The appointment of a public prosecutor might have helped, but both this general problem and the growth of the [legal] profession were unremarked by the Commissioners.<sup>336</sup>

[2.10.4] This, as will be discussed in Chapter 5, is a vital factor in a system where ordinarily there was (and, indeed, still often is) inequality between the resources of the prosecution and those of the accused.<sup>337</sup> The need to promote candour and transparency by the prosecution and to reveal any relevant material or witness to ensure a fair trial for the accused is one that has occupied the attention of the criminal justice system for over two centuries. The vital question of what material or witnesses the prosecution should adduce at trial and/or disclose to the accused is one that has continued to trouble the criminal justice system to the present day. The duties of the prosecuting lawyer as a minister of justice are not confined to the conduct of the actual trial.<sup>338</sup> Of equal, or perhaps even greater, importance is the application of the minister of justice role to how the prosecution discharges its duties outside the courtroom, notably in its preparation of the prosecution case for trial. The development of the prosecutorial role as a minister of justice has important implications for the prosecution's discharge of its connected duties of disclosure of relevant material in its possession to the defence and in its choice of the witnesses to be called at trial. How these duties are to be discharged by the prosecuting lawyer within the context of his or her position as a minister of justice whilst acting within an adversarial criminal process is not susceptible to a simple or straightforward answer and will be considered further in Chapters 5 and 6 (disclosure) and 7, 8, 9 and 10 (calling witnesses).

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<sup>336</sup> *Ibid.* See also Cairns (1998), above n 43, 106-110. The reference to the Commissioners is a reference to the Criminal Law Commissioners of England who in the 1830s and 1840s prepared eight reports into many aspects of the English criminal justice system.

<sup>337</sup> See *R v McKenny* (1991) 93 Cr App R 287 at 312 and *R v C & Ors* [2006] SASC 158 at [45]. See further the discussion in Part 9 of Chapter 5 at [5.9.2].

<sup>338</sup> See *R v Lucas* [1973] VR 693 at 703.

# CHAPTER 3

## THE DEVELOPMENT AND APPLICATION IN NINETEENTH CENTURY AUSTRALIA OF THE PROSECUTOR'S ROLE AS A MINISTER OF JUSTICE: RHETORIC OR REALITY?

*The English notion of the prosecutorial role as a minister of justice was expressed in Australia by colonial legal practitioners but in practice the application of this role in early Australia was to prove often a matter of rhetoric rather than of reality. Prosecutors in practice often acted as partisan advocates. This chapter will consider the development of the prosecutorial role in Australia from 1824 to the 20<sup>th</sup> century and in particular the extent to which the English model of the prosecutor as a minister of justice was applied in Australia. This chapter will also examine the factors that influenced the perception and performance of the prosecutorial role in practice in Australia. Prosecutors in practice were motivated by subjective factors such as the class or race of the accused and the nature of the crime that they were charged with. Prosecutorial zeal seems explicable, not by the tension of acting in an adversarial system, but in confronting defendants who were regarded as posing a real "threat" to colonial society. Though the minister of justice role was applied in Australia on occasion, it was often reserved for "respectable" defendants and to be the product of class bias rather than genuine prosecutorial restraint. Nevertheless, despite the inconsistent development in Australia of the minister of justice role, it is significant that as the 19<sup>th</sup> century progressed it was increasingly applied as a matter of both rhetoric and reality, reflecting the increasing stability and confidence of the Australian colonies.*

### Part 1: Introduction

"In detailing the circumstances of the case, he would confine himself to a mere statement of the facts which he hoped to establish in evidence. God forbid! that he should employ any powers of exaggeration to deepen the guilt of the accused. For his part he held it as a principle that it was not the duty of a public prosecutor, a character in which he stood forth today, to employ means to secure a conviction, but to elicit the truth. And if the jury should, after a full consideration of the whole of this case, be of the opinion that the



prisoners were not guilty of the crime imputed to them, he would say, with as much sincerity as his learned friend who defended them, 'Let them go forth from that bar, for God forbid! that a hair of their heads should be touched unless legal guilt be established by legal proof.'<sup>1</sup>

[3.1.1] These enthusiastic comments on the nature of the prosecutorial role were offered by prosecution counsel, a Mr. Therry, in the course of his opening address in 1832 in *R v Anderson, Davis and Others*,<sup>2</sup> during a trial of several sailors for mutiny on a convict ship. Therry's concept of the prosecutorial role accords with the English notion of prosecution counsel as the detached figure of restraint, astute to promote a fair trial and only concerned to seek the truth as discussed in the last Chapter. Therry, in *Anderson and Davies* at least,<sup>3</sup> did not view his role as that of the adversarial advocate with an overriding duty to secure the accused's conviction and in so doing "employ any powers of exaggeration to deepen the guilt of the accused."<sup>4</sup>

[3.1.2] Therry's perception of the prosecutorial role is unsurprising. It is clear by the 1820s that the prosecutorial role in England was perceived as one of the minister of justice. The confirmation in England by the 1820s of the principle that the role of the prosecuting lawyer was not that of a mere advocate raises the largely overlooked question of how the role of the prosecuting lawyer was perceived and applied within the very different context of the Australian jurisdictions in the nineteenth century. Did the English model of a minister of justice apply unchanged in Australia, as precedent and custom might suggest, or was a distinctly Australian prosecutorial model to evolve reflecting local conditions and circumstances?

[3.1.3] The logical starting point for tracing the development of the prosecutorial role in Australia is the establishment of the Supreme Courts of Van Diemen's Land and New South Wales in 1824. The minister of justice role was firmly established in England by this time. Given this fact and the status of Tasmania and New South Wales as British colonies one might have expected that the English model of a minister of justice would have been imported into Australia with the establishment of the Supreme Courts. However, this was not to prove the case. Analysis of the historical development in Australia of the prosecutor's role shows that adherence to the minister of justice concept had a chequered history. At times it was abandoned in favour of that of the partisan advocate, even persecutor. At times it was scrupulously observed. In the period immediately following 1824 until the middle part of the 1800s it is striking that prosecution counsel's adherence to the minister of justice concept was on a selective and inconsistent basis and appears to have been often, though by no means always, manifest in cases involving "respectable" accused. Rather than acting as the restrained and impartial figure one observes throughout the early decades of British settlement a strong

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<sup>1</sup> *Sydney Gazette*, 17 April 1832.

<sup>2</sup> [1832] NSWSupC 8 (*Sydney Gazette*, 17 April 1832).

<sup>3</sup> Mr. Therry's enthusiasm for prosecutorial moderation in this case should be contrasted with the approach he later demonstrated in *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald*, 12 August 1840), see below n 223.

<sup>4</sup> Or to bring before the jury the enormity of the crime and paint it in "its most debasing colours" as was suggested by the Attorney-General in *R v Kilmeister & Ors* (No 2) [1838] NSWSupC 110 (*The Australian*, 1 December 1832). See Chapter 2, n 326.

though by no means universal adherence by prosecution counsel to the role of an adversarial partisan advocate.

[3.1.4] There are a number of factors that explain the early development of the prosecutorial role in Australia. It might be thought that the newly adversarial model for criminal justice that was transplanted to Australia,<sup>5</sup> especially in 1824 with the establishment of the Supreme Courts, provided a temptation for prosecutors to assume the mantle of the partisan advocate as opposed to the detached minister of justice. As was suggested in the last Chapter there is a potential tension in the dual prosecutorial roles of both active advocate in an adversarial system and restrained minister of justice and this tension was manifest in certain nineteenth century cases such as *Palmer* and *Jephson*.<sup>6</sup> However, any such tension did not prevent the confirmation in England of the unchallenged notion of the prosecutor as a minister of justice.<sup>7</sup> Similarly, the apparent tension in the dual prosecutorial roles was not to significantly influence the development of the prosecutorial role in Australia. Rather the explanation for the early development of the prosecutorial role in Australia lies with other factors.

[3.1.5] It is my argument that prosecutors were influenced in the approach they adopted at trial by subjective factors, namely the background and position of the accused, the nature of the crime with which they were charged and the nature of colonial society. The respectable or high social standing of an accused on occasion influenced the prosecutor to adopt a moderate stance. This appears to have been particularly evident in the early years of the colony when, “tiny” as penal Australia was, as Hughes notes, “the question of class was all-pervasive and pathological.”<sup>8</sup> In such a small and stratified society any accused of high social standing was likely to be known in some capacity to counsel and/or the bench.<sup>9</sup> In contrast the adoption of an adversarial role by prosecution counsel was prompted to a real extent by the nature of colonial society at that time. There was a strong fear factor in the newly established colonies, whether from convicts, bushrangers, Aborigines, Irish political exiles or other classes of offenders. All were perceived as posing a real threat to the, as yet, insecure fabric of colonial society. The need to maintain order and deter such “enemies of society” had a strong impact on the development of the

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<sup>5</sup> It is clear, as discussed in Part 4 of Chapter 2, that during the latter part of the 1700s and the early part of the 1800s the criminal trial in England shifted dramatically in form from an essentially lawyer free inquisitorial process to a lawyer driven adversarial process. See further Landsman, Ch 2, n 28.

<sup>6</sup> See also the similar tension manifest in *R v Kilmeister & Ors* (No 2) [1838] NSWSupC 110 (*The Australian*, 1 December 1832 and *Sydney Gazette*, 1 December 1838) and the Tasmanian case of *R v Bogle* [1842] TASSupC 32 (*True Colonist*, 16 December 1842).

<sup>7</sup> See the discussion in Part 9 of Chapter 2.

<sup>8</sup> Hughes, R, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (London, Collins Harvill, 1987) p 323. See also Meredith, L, *Notes and Sketches of New South Wales During a Residence in that Colony from 1839 to 1844* (London, John Murray, 1844) p 52-53.

<sup>9</sup> See, for example, the apparently well known “respectable” defendants in *R v Lord* [1834] TASSupC 8 (*The Colonist*, 10 June 1834), *R v Lewis* [1834] TASSupC 14 (*Colonial Times*, 13 May 1834 and *Hobart Town Courier*, 16 May 1834), *R v Rowlands* (No 1) [1836] TasSupC 1 (*Tasmanian*, 6 February 1836 and *True Colonist*, 5 February 1836), *R v Bolden* (*Port Philip Patriot*, 6 December 1841), *R v Ross* [1842] TASSupC 7 (*Colonial Times*, 15 March 1842) and *R v Valentine* [1842] TASSupC 4 (*Launceston Courier*, 16 January 1843).

prosecutorial role in Australia and, compared with England,<sup>10</sup> delayed the emergence of the minister of justice model.

[3.1.6] The development of the prosecutorial role in Australia was influenced in practice by such factors as the social class and race of the accused and the perceived need to make an "example" out of certain classes of offenders who were perceived to represent a threat to the tenuous stability of the newly established Australian colonies. Though these prosecutorial traits were not unknown in England,<sup>11</sup> my research suggests that they appear to have been more explicit and pronounced in practice in Australia. The prosecutorial role of a minister of justice emerged slowly and unevenly in practice in Australia, compared with England. Gradually however, the prosecutorial role as a minister of justice became established in Australia, both as a matter of rhetoric and in reality. Its slow recognition and subsequent entrenchment reflected the transformation of colonial society during the mid 1800s as there was a retreat of the frontier mentality and a growing sense of security and social stability.

## Part 2: Methodology

[3.2.1] There is almost a complete lack of reported authority on the development of the prosecutorial role in nineteenth century Australia. Unlike England there are no cases such as *Puddick* or *Berens* that provided judicial definition of the prosecutorial role in Australia. However, the press reports of the period of criminal trials provide a valuable, previously overlooked, source of historical reference.<sup>12</sup> In the absence of formally reported decisions I have studied all the press extracts of court proceedings compiled and published by the School of History and Classics, University of Tasmania and the Division of Law, Macquarie University in respect of the period from 1824 to 1843.<sup>13</sup> This covers not only a vital period in the evolution of the role of the prosecuting lawyer but also other important legal developments in Australia. In respect of the period after 1843 it proved logistically impossible to research every Australian newspaper and journal.<sup>14</sup> Rather I

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<sup>10</sup> It is noteworthy that the minister of justice role developed in England at a time of virtual continuous civil war in Ireland (Hughes, above n 8, 194; see further Moore, T, *Death or Liberty: Rebels and Radicals Transported to Australia 1788-1868* (Sydney, Murdoch Books Australia, 2010) p 68-133, 300 and 308-313), deep social and industrial unrest in England (Hughes, above n 8, 196 and Moore, above n 10, 135-209, especially 136-137) and, in particular, fears of an increasing "crime wave" in England in the turbulent aftermath explosion of the Napoleonic Wars (see Hughes, above n 8, 163-173 and Lyman, Ch 2, n 247, 141).

<sup>11</sup> See the discussion of *R v Courvoisier* in Part 8 of Chapter 2 and the cases noted in Chapter 2, n 111 and n 275.

<sup>12</sup> It was routine until well into the 20<sup>th</sup> century for journals and the daily newspapers in both England and Australia to report criminal cases, especially the leading or sensational trials of the period, at considerable, and sometimes almost verbatim, length. It was commonplace to find even comparatively routine cases reported in significant detail.

<sup>13</sup> These cases are largely, though not totally, available online at: <http://www.austlii.edu.au>. Though these records and commentaries are a valuable source of historical and legal research they are necessarily incomplete. They cover only a proportion of the criminal trials of the period and do not include all the press reports of any trial included. The records stop in 1842. The National Library of Australia in 2008 (sadly after most of the time consuming research for this thesis had been already carried out) has now placed the entire archives of many of the newspapers of the 1800s on line at <http://newspapers.nla.gov.au/ndp/del/home>.

<sup>14</sup> The time and labour involved in manually trawling through the archives precluded this. However, with ongoing additions to the Austlii records and with the new National Library of Australia computer data base there is clearly great scope for future fertile legal and social historical research in this area.

have looked at a sample of leading trials (such as the capital punishment cases of the period) and routine criminal cases<sup>15</sup> to see if any themes emerge as to the prosecutorial role for this period.<sup>16</sup> The leading cases of notable or sensational criminal trials represent provide a suitable yardstick by which to measure the prosecutorial role in nineteenth century Australia because it is in dealing with the challenge of prosecuting grave crimes, which often gave rise to strong community passion, that the role of the prosecuting lawyer in adhering to the ideal of a minister of justice can be assessed. These cases are the ones most likely to reveal how the prosecutors of the period perceived and performed their role.

[3.2.2] The press reports of these criminal trials provide a crucial insight into the understanding of the prosecutorial role in the nineteenth century in the absence of any Australian judicial decision until 1946 confirming that the prosecutorial role was as a minister of justice.<sup>17</sup> The press accounts of the trials during this period illustrate the perception and performance of the prosecutorial role, most notably by the prosecutors themselves. It is from the words and deeds of prosecution counsel at trial that one is best able to consider the early development of the prosecutorial role in Australia. The prosecutorial role essentially developed in Australia according to the practice of prosecutors.

### **Part 3: The Evolution of the Prosecutor’s Role in Nineteen Century Australia**

[3.3.1] The obvious starting point for any examination of the development of the prosecutorial role in Australia is set by the establishment of the Supreme Courts of Tasmania and New South Wales in 1824. It was only with the introduction of these courts that there existed some proper forum in which the practical operation of the prosecutorial role in Australia could be measured. Prior to 1824 the colony was strictly of a military and penal character and it is clear that both criminal justice and the specific role of the prosecuting lawyer functioned on a simplistic and “rough and ready” level. As Castles notes, there was no need for a complex legal system or series of courts “in a small struggling colony in which a battle of survival was to be of paramount importance, at least in the earliest years.”<sup>18</sup> Such a backdrop afforded little assistance in fostering the

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<sup>15</sup> The routine criminal cases were selected at random. Apart from scrutinising all the cases online at Austlii, I checked the newspaper archives for several months of two years for each decade from 1842 to 1880 and scrutinised the reports of every criminal trial for those periods to see if any themes emerged as to the discharge of the prosecutorial role. However, the majority of the press reports shed little light on this issue. The sensational or leading criminal cases tend to be reported at greater length and afford more opportunity for shedding light on the prosecutorial role.

<sup>16</sup> Most of these trials are now available at the recent on line newspaper archives of the National Library of Australia.

<sup>17</sup> This contrasts with England where the role of a minister of justice seems to have emerged from a combination of professional practice and etiquette and judicial confirmation a few years later, see the discussion in Part 3 of Chapter 2.

<sup>18</sup> Castles, A, *An Australian Legal History* (Sydney, Law Book Co Ltd, 1982) p 39.

development and scope of the early prosecutorial role in Australia as a minister of justice or otherwise.<sup>19</sup>

[3.3.2] What becomes clear in the period after 1824 is that the prosecutorial role was to develop in Australia on an uneven basis and to be influenced by the colonial social context in which it evolved. Though in some cases the English notion of prosecutorial restraint was applied, in practice this was heavily in favour of "respectable" defendants. Indeed, on occasion the prosecutor appears, in the prosecution of defendants who could be regarded as "gentlemen," to have acted not so much as an objective minister of justice but as a far from dispassionate figure straining to be accommodating, even partial, to the cause of the defendant. By way of contrast in other cases, notably where the defendants were regarded as representing an "enemy of society," the prosecutor often abandoned any notion of restraint and acted as the partisan advocate bent solely on the conviction of the accused.

[3.3.3] The development of the prosecutorial role in nineteenth century Australia was influenced by the English approach. As was discussed in Chapter 2 it is clear that by the 1820s the prosecutorial role in England was that of the non-partisan figure of restraint, rather than the partisan advocate. Given Australia's colonial status in the 1800s, the British<sup>20</sup> background of Australian prosecutors and the adoption in 1828 in the Australian colonies of the law of England,<sup>21</sup> one might have assumed that the prevailing prosecutorial role from England of a minister of justice would have applied in Australia. However, the laws and practices of England did not necessarily apply unchanged in Australia.<sup>22</sup> In *R v Farrell and Others*<sup>23</sup> in 1831 Dowling J highlighted the peculiar, if not unique, position New South Wales within the British Empire owing to its inhabitants and the relations produced in the course of its convict society. On account of the "local difficulties and peculiarities" arising from such an unusual society, Dowling J noted that he

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<sup>19</sup> It is beyond the scope of this Thesis to discuss in any detail the development of legal institutions in Australia. It is, however, notable, that prior to the establishment of the Supreme Courts in 1824 the criminal law was administered in an arbitrary manner more akin to an inquisitorial system through the efforts of the Judge-Advocate who acted as the prosecutor, framed the indictment and presided over the court and had a vote in its judgment, see Windeyer, W, *Lectures on Legal History* (2<sup>nd</sup> ed (revised)) (Sydney, The Law Book of Australasia, 1957), p 302. It was only with the establishment of the Supreme Courts that a broadly adversarial system of criminal justice, similar to that which had recently evolved in England, was transplanted in Australia. See further Castles, above n 18, 32-66.

<sup>20</sup> This includes both the English and Irish background of Australian prosecutors.

<sup>21</sup> It is beyond the scope of this Thesis to embark upon any constitutional discussion of the reception into the Australian colonies of the law of England (both case law and statutory); whether by application of s 24 of the *Australian Courts Act* 1828 (Imp) and/or the proposition of Blackstone that any applicable English law automatically applied at the time of the British "settlement," as opposed to "conquest" of an "unoccupied" colony. See Windeyer, above n 19, 303-313.

<sup>22</sup> See Therry, R, *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (Sydney University Press, Sydney, 1974) p 317. See further Kercher, B, *An Unruly Child: A History of Law in Australia* (Sydney, Allen and Unwin, 1995) for a discussion of how, even as early as 1788 (*Ibid*, 194), a distinctive quality to the law in Australia was to emerge in many areas and that it was not simply a pale imitation of English law.

<sup>23</sup> *Sydney Gazette*, 26, 28 and 30 July 1831. NSW Select Cases (Dowling 1828-1844) 136. This case arose from the celebrated burglary of the Bank of Australia. It raised the issue of the admissibility of the testimony of a convict. See further Baxter, C, *Breaking the Bank: an Extraordinary Colonial Robbery* (Crows Nest, Allen & Unwin, 2008).

and his brother judges of the New South Wales Supreme Court had found themselves constantly obstructed in “endeavouring to apply even some of the fundamental principles of the common law of England.”<sup>24</sup> Dowling J observed that he and his fellow judges had “been compelled to lay down principles, and adopt resolutions, which would perhaps startle a lawyer in Westminster Hall, but which they have been driven to resort to in order to meet the exigences [sic] of society” in New South Wales.<sup>25</sup> The differences in law and practice between England and Australia in the 1800s extended to the criminal jurisdiction. As was noted in 1958 by Kidston:

Kinship in blood and ideas is a strong power; yet in the two lands life has not been quite the same, nor has opinion. In 1828 parts of English law were not, and might never be, suited even to the improving state of the colony. In the years since, we have not always adopted newer English laws and practice, and parts of the local law are home-grown; so that differences have arisen. At rare times we have found a better way. We still follow paths which England has ceased to tread, and have broken some new ground for our doing. On the criminal side this has happened both...not only in substantive but also in adjective law, for example in the processes of prosecution.<sup>26</sup>

[3.3.4] There were marked disparities between the criminal procedures of Australia and England in the 1800s in relation to such major issues of practice as the roles of the private prosecutor<sup>27</sup> and the grand jury.<sup>28</sup> Therefore, in theory at least, it may have been open for a different prosecutorial role to have evolved in Australia reflecting local conditions and circumstances than had developed in England by the 1820s.

[3.3.5] Though there does not seem to have been in Australia in the nineteenth century any similar judicial statement as to the prosecutor’s duty as had been expressed in such clear terms in England,<sup>29</sup> one can, nevertheless, find both prosecution and defence counsel in Australia referring in clear minister of justice terms to the expected role of the prosecutor. As early as 1827, the Attorney-General in *R v Horan*,<sup>30</sup> when appearing in a private capacity<sup>31</sup> made it clear that he was appearing “as an advocate, and not as his duty

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<sup>24</sup> *Sydney Gazette*, 30 July 1831 and NSW Select Cases (Dowling 1828-1844) 136 at 148.

<sup>25</sup> *Sydney Gazette*, 30 July 1831 and NSW Select Cases (Dowling 1828-1844) 136 at 148.

<sup>26</sup> Kidston P, “The Office of Crown Prosecutor (More Particularly in New South Wales)” (1958) 32 ALJ 148 at 149.

<sup>27</sup> See *Ibid*, 148. The private prosecutor, so pivotal to the English criminal system of the 1800s, never acquired the same prominence in the Australian colonies where from the outset of British settlement prosecutions were largely brought on a public basis.

<sup>28</sup> The grand jury, a major feature of nineteenth century English criminal procedure, never acquired the same prominence in Australia. See the discussion of Dawson J in *R v Grassby* (1989) 168 CLR 1 at 10-14 and Bennet, J, “The Establishment of Juries in New South Wales” (1961) 3 Syd L Rev 462 at 482-485. In *R v Bingle & Were* [1837] NSWSupC 25 (*Sydney Herald*, 15 May 1837) the Attorney-General lamented the absence in New South Wales of the grand jury and professed that “no man would more rejoice” (*Ibid*) than he at being relieved of the responsibility of deciding whether someone should be indicted or not.

<sup>29</sup> It was not until 1946 with *R v Bathgate* (1946) 46 SR (NSW) 281 at 284-5 that one can find in Australia a formal reported judicial expression of the prosecutor’s duty.

<sup>30</sup> [1828] NSWSupC 62 (*The Australian*, 22 August 1828).

<sup>31</sup> It was not unusual for “public” prosecutors in the Australian colonies such as the Attorney-General and the Solicitor-General to retain a private legal practice.

most commonly requires, as a prosecutor.”<sup>32</sup> This theme was developed, as seen, by Mr. Therry in *R v Anderson, Davis and Others*,<sup>33</sup> during the trial of several sailors for a mutiny on a convict ship.<sup>34</sup> A similar formulation was expressed in *R v Davidson*<sup>35</sup> in 1841 by the New South Wales Solicitor General:

The character in which he represented the Crown was not one of vengeance, nor was he dispensing of justice, neither was he an advocate in the ordinary sense of the word. It was not his duty to make nice distinctions, nor by subtle arguments to strain a case against a prisoner, but simply to bring it before the jury...As Crown Prosecutor he would always have the right of reply, whether witnesses were called for the prisoner or not, but this was a course which he would always exercise very tenderly.<sup>36</sup>

[3.3.6] A similar view was expressed and demonstrated by *R v Sparks and Campbell*<sup>37</sup> heard in the Supreme Court of Tasmania in 1843. The two defendants were aged only 14 and 16 and were inmates at the juvenile prison at Point Puer. It was alleged that they had murdered the prison's overseer. The Attorney-General's conduct of the trial, unlike that of other colonial prosecutors in of the period,<sup>38</sup> was a model of restraint and fairness. In his opening address to the jury he frankly conceded his doubts as to the strength of the prosecution case and the difficulty that he had had in arriving at any satisfactory conclusion in the manner at which the deceased had met his death.<sup>39</sup> The Attorney was at pains to explain to the jury that his role was to bring all material evidence for their consideration, even if it was unhelpful to the prosecution case. He emphasised the “extraordinary discrepancy” in the prosecution's case and drew the jury's attention to the “manifest discrepancies” in the accounts of the four main prosecution witnesses.<sup>40</sup> He declared:

And God forbid...that while conducting a prosecution on the part of the Crown, I should ever withhold any portion of the evidence that might tell in favour of the prisoner or keep back anything that might possibly cast a doubt upon the testimony of the witness, on behalf of the prosecution.<sup>41</sup>

[3.3.7] The Attorney professed his concern that further evidence had come to light since committal (which he had supplied to defence counsel).<sup>42</sup> As a result of that further

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<sup>32</sup> *The Australian*, 22 August 1828.

<sup>33</sup> [1832] NSWSupC 8 (*Sydney Gazette*, 17 April 1832).

<sup>34</sup> *Sydney Herald*, 17 April 1832.

<sup>35</sup> [1841] NSWSupC 43 (*Sydney Herald*, 1 May 1841).

<sup>36</sup> *Sydney Herald*, 1 May 1841.

<sup>37</sup> See *Hobart Town Courier*, 4 August 1843, p 4; *Hobart Town Advertiser*, 28 July 1843 and *Colonial Times*, 1 August 1843, p 3.

<sup>38</sup> See the discussion below in Part 5 of this Chapter.

<sup>39</sup> See *Hobart Town Courier*, 4 August 1843, p 4. It was far from clear which prisoner at Point Puer had been responsible for the death of the overseer.

<sup>40</sup> *Colonial Times*, 1 August 1843, p 3.

<sup>41</sup> *Ibid.* See further the discussion of this principle in Part 2 of Chapter 5 and Part 3 of Chapter 7.

<sup>42</sup> There was after 1836 a rule of practice encouraging the prosecution to furnish to the defence the evidence of any witness who had not given evidence at committal, see *R v Greenslade* (1870) 11 Cox CC 412 and 413, n (a).

evidence, to ensure that the jury had the whole picture before them the Attorney called a witness purely for the defence to cross-examine.<sup>43</sup> Defence counsel in his closing address even commended the Attorney-General for the manner in which he had introduced and conducted the prosecution case to its close<sup>44</sup> and in particular for his “fairness and candour”<sup>45</sup> in outlining his doubts about the strength of the prosecution case. Both accused, perhaps unsurprisingly in the circumstances, were acquitted. The Attorney-General in *Sparks and Campbell*, demonstrating an awareness of his role as a minister of justice that was not always shared in practice by colonial prosecutors of the period, was at pains to ensure that both the jury and the defence were not kept “in the dark” as regards any material witness or other evidence.<sup>46</sup>

[3.3.8] Defence counsel can also be found referring to the prosecutor’s role in similar terms. In 1868, during the retrial of the so-called “Rokewood Murder,”<sup>47</sup> defence counsel complained in his opening address of the absence at trial of certain witnesses who might have contradicted the incriminating evidence of a police constable.<sup>48</sup> Mr. Smythe contended:

It was the duty of the Crown not to seek to get a conviction, but to establish the truth – to punish the perpetrator of the deed, but not the man who had been the victim of a series of mistakes.<sup>49</sup>

[3.3.9] However, such declarations do not wholly represent the reality of prosecution practice in Australia in the nineteenth century. In many cases the English notion of the prosecutor as a minister of justice was to prove less a matter of reality than a matter of rhetoric. It is my argument that although the English notion of the prosecutor as a minister of justice was to receive belated explicit judicial approval in Australia, this was not settled until 1946 in *R v Bathgate*.<sup>50</sup>

#### **Part 4: Prosecutorial Restraint in 1800s Australia: Minister of Justice or Class Bias?**

[3.4.1] Joseph Plunkett, the Attorney-General, in 1837 in *R v Donnison*<sup>51</sup> during the trial of a Magistrate for the alleged theft of cattle declared that he had would approach the case

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<sup>43</sup> This practice despite some judicial disapproval is an accepted and well established procedure and is often employed by prosecution counsel to ensure that the defence have an opportunity to cross-examine a witness whose testimony is unnecessary or unhelpful to the prosecution case, see further the discussion in Chapter 7, n 98.

<sup>44</sup> *Hobart Town Advertiser*, 28 July 1843.

<sup>45</sup> *Hobart Town Courier*, 4 August 1843, p 4.

<sup>46</sup> The Attorney’s approach in this context should be contrasted with that adopted by the prosecution in the 1868 trial of *R v O’Farrell*, see the discussion of this case in Part 3 of Chapter 5.

<sup>47</sup> *R v Whelan*, *The Argus*, 19 (p 7), 20 (p 6), 21 (p 7), 22 (p 6), 24 (p 4) and 25 February (p 6) 1868. See also *The Age*, 19 February-25 February 1868.

<sup>48</sup> The prosecutor’s duty as a minister of justice or otherwise in calling witnesses is considered in Chapters 7-9 of this Thesis.

<sup>49</sup> *The Age*, 22 February 1868.

<sup>50</sup> (1946) 46 SR (NSW) 281 at 284-285.

<sup>51</sup> *Sydney Herald*, 2 March 1837.



without any undue deference to the accused's position. Plunkett stated that when a *prima facie* case appeared to him upon the depositions of the prosecution witnesses "of course a gentleman was no more entitled to respect than a poor man."<sup>52</sup> Plunkett observed that he hoped the time would never come "when it could be said of this Colony as an eminent lawyer... had once said of Ireland, 'there is one law for the rich and one law for the poor.'"<sup>53</sup> However, it is clear that not all prosecutors proved as impartial as Plunkett had declared in *Donnison*. An examination of the cases in Australia for the period from 1824 to the middle of the century reveals that on occasion the status of the accused had a real impact on the manner in which the prosecuting lawyer discharged his role.

[3.4.2] One of the earliest cases to demonstrate the apparent influence of the defendant's position on the prosecutor's perception of his role is *R v Tibbs*,<sup>54</sup> the first case to be tried in the Supreme Court of Tasmania. In his opening address Joseph Gellibrand, the Attorney-General, was adamant that he would approach his role without fear or favour of the defendant's status:

I wish in few words to state the line of conduct I intend to pursue, that if in cases, which I must of necessity bring before the Court, and with respect to which persons may be implicated, that whether they be high or low, rich or poor, bond or free – I must and will do my duty.<sup>55</sup>

[3.4.3] The defendant in *Tibbs* was not a convict but was a "well recommended"<sup>56</sup> white man who had only recently arrived in the Colony and who had been charged with the unlawful death of an Aboriginal man.<sup>57</sup> The accused's status and the fact that the deceased was an Aborigine may well have influenced the Attorney's approach.

[3.4.4] There is no doubt that a scrutiny of the criminal trials in Australia reveals many instances of prosecution counsel from the earliest cases to come before the new Supreme Courts adhering to the English concept of the judicious figure of restraint regardless of the standing of the accused or the nature of their alleged crime.<sup>58</sup> Nevertheless, this

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* See also *R v Robertson & Nelson* (*Sydney Gazette*, 19 and 26 April 1842) (dedicated prosecution of a ship's captain and surgeon accused of assaulting a vulnerable female passenger, see further Therry, above n 22, 221-223), *R v Thompson* (*Sydney Morning Herald*, 17 January 1844) (ship's captain prosecuted for assaulting a cabin boy) and *R v Hawdon* (*Sydney Morning Herald*, 11 January 1845) (the Attorney-General indicted a Magistrate at the Supreme Court rather than a lower court for an alleged assault committed in the course of his duties).

<sup>54</sup> [1824] TASSupC 1 (*Hobart Town Gazette*, 28 May 1824).

<sup>55</sup> *R v Tibbs* [1824] TASSupC 1 (*Hobart Town Gazette*, 28 May 1824).

<sup>56</sup> *Hobart Town Gazette*, 28 May 1824.

<sup>57</sup> Tibbs was convicted of manslaughter and ordered to be transported for three years.

<sup>58</sup> See *R v Pearce* [1824] 11 (*Hobart Town Gazette*, 25 June and 6 August 1824) (see further below n 90). Various prosecutors were also the model of restraint and fairness in such other early cases as *R v Reardon & Tydey* [1824] TASSupC 5 (*Hobart Town Gazette*, 11 June 1824) (murder), *R v McCabe* [1825] TASSupC 17 (*Colonial Times*, 4 November 1825) and *R v Regan & Ors* [1838] TASSupC 12 (*Hobart Town Courier*, 15 June 1838) (both involved robberies by escaped convicts who were notorious bushrangers), *R v Cam & Denner* [1832] TASSupC 19 (*Tasmanian*, 7 April 1832) (convicts charged with piracy from their effort at escape by seizing a boat), *R v Wells* [1833] TASSupC 3 (*Tasmanian*, 22 March 1833) (the commission of an "unnatural act" with a calf), *R v Flannigan* [1838] NSWSupC 40 (*Sydney Gazette*, 3 May 1838) (assault with intent to murder) and *R v Neale* (*Sydney Herald*, 12 January 1842) (the murder of a police constable in Sydney).

approach was unevenly observed. There was a recurring coincidence in Australia, unlike the apparent practice in England, between this restrained approach and the elevated status of the accused.<sup>59</sup> For example, in *R v Lord*<sup>60</sup> in Tasmania in 1834 the accused was charged with misappropriation of government property while acting as the commandant of the convict station at Maria Island. At trial the Solicitor-General appealed to the jury to arrive at a “calm, deliberate and conscientious verdict” and to dismiss any “scandalous rumours” prejudicial to the accused that they may have heard.<sup>61</sup> The Solicitor-General concluded his opening address with the following exhortation to the jury:

If anything approaching to a doubt should remain on the minds of the Jury after hearing the evidence he should produce, he would say that none of the highly respectable witnesses and friends of Major Lord who had been subpoenaed for the defence, would be more gratified than himself if the Jury could say that Major Lord was not guilty.<sup>62</sup>

[3.4.5] Indeed, so conspicuous was the restraint with which the Solicitor-General conducted the prosecution case that the editor of the *Colonist* felt compelled to observe that “on this occasion the learned Gentleman seems to have changed his nature, or to have fancied he was pleading for, instead of against the accused.”<sup>63</sup> The editor, not wishing to “condemn a public prosecutor for leaning to the side of mercy,” could not help but contrast the benign approach of the Solicitor-General in *Lord* with the “bitterness” with which he usually conducted the prosecution case and pointedly suggested that it “would be far more congenial to our ideas of propriety, as well as more in character with the spirit of English law, if public prosecutors always refrained from prejudicing the case of the accused” in any address to the jury.<sup>64</sup>

[3.4.6] Though not explicitly suggested by the editor, the Solicitor-General’s concluding remarks raise more than a suspicion that the respectable standing of the accused in *Lord* explained the moderate nature of the prosecutor’s approach. His reference to the respectable standing of the defence witnesses in *Lord* suggests not so much prosecutorial restraint as class prejudice and bias. This case and others considered below suggest that the recourse by prosecution counsel to notions of restraint and fairness was often a convenient cloak to disguise the apparent sympathy with which he might conduct the prosecution case if the accused happened to be a fellow “gentleman.” What the prosecutor in *Lord* was demonstrating was not moderation due to his role as a minister of justice but rather explicit preferential treatment by one “gentleman” of another masquerading as the customary prosecutorial restraint. A similar approach is observed in 1829 in *R v Wright*.<sup>65</sup> Here the accused was a Captain in the British Army who was

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<sup>59</sup> In England whilst such prosecutorial restraint in favour of “gentlemen” was not unknown (see the cases cited in Chapter 2, n 102) it is important to note that such a trend appears to have been less explicit in England than in Australia, see *R v Jephson* (*The Times*, 25 July 1823) and *R v Seymour & Macklin* (*The Times*, 14 March 1828 and 17 March 1828). See further the discussion in Parts 3 and 9 of Chapter 2.

<sup>60</sup> [1834] TASSupC 8 (*The Colonist*, 10 June 1834). See also *Colonial Times*, 10 June 1834.

<sup>61</sup> *The Colonist*, 10 June 1834.

<sup>62</sup> *Colonial Times*, 10 June 1834.

<sup>63</sup> *The Colonist*, 10 June 1834. See the editor’s footnote to the report of the trial.

<sup>64</sup> *Ibid.*

<sup>65</sup> [1829] NSWSupC 70 (*The Australian*, 9 October 1829 and *Sydney Gazette*, 13 October 1829).

charged with ordering the murder of a convict at Norfolk Island. Prosecution counsel, Mr. Wentworth, expressed his reluctance to prosecute the accused and assured the military jury that, "The only object of the prosecutor is to attain the ends of public justice."<sup>66</sup> Mr. Wentworth acted with such scrupulous restraint that he was praised by the trial judge, Dowling J, for the "extremely delicate, proper and able manner"<sup>67</sup> in which he had conducted the prosecution case in such a manner as to do himself "infinite honour."<sup>68</sup> Wright was acquitted.

[3.4.7] Nor was such prosecutorial benevolence extended only to officers of the British garrison. Other "respectable" individuals could also benefit from prosecutorial restraint. In *R v Kinghorne*<sup>69</sup> in 1842 the accused was a landowner who was accused of shooting at an assigned convict servant with intent to cause him grievous bodily harm after an altercation when the alleged victim had shown "extreme insolence"<sup>70</sup> to the accused and had refused to obey his orders to move some horses. The Solicitor-General, prosecuting, commented that no doubt the accused would be known to many members of the jury and as the jurors and the accused "all were alike men"<sup>71</sup> the accused would be bound to have the jurors' sympathy to a certain extent. Nevertheless, it was incumbent upon the jury to put aside any bias and to act only on the evidence that would be put before them. The accused faced a "most serious offence of which no doubt they would be glad to find him guiltless, and should such be the result he [the Solicitor-General] need not say that he should also be happy."<sup>72</sup> Similar prosecutorial sympathy was shown in *R v Valentine*<sup>73</sup> in 1843 in Tasmania. In this case the accused was a highly respected surgeon who was charged with manslaughter following a medical procedure. The Attorney-General conducted his case with a studied restraint that one cannot help but suspect was attributable to prosecutorial favour rather than prosecutorial detachment. The Attorney was at pains to emphasise to the jury his reluctance to have even preferred charges.

[3.4.8] Magistrates were also amongst the defendants who might benefit from prosecutorial benevolence. In *R v McIntyre*,<sup>74</sup> a trial for perjury, the prosecution counsel, Mr. Therry, professed his "greatest reluctance" in approaching the case.<sup>75</sup> The accused

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<sup>66</sup> *The Australian*, 9 October 1829.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Sydney Gazette*, 13 October 1829. Mr. Wentworth had effectively "thrown in the towel" after unfavourable testimony. It is, however, noteworthy that there were a number of significant oddities in the conduct of the trial. See the commentary in *The Australian*, 14 October 1829.

<sup>69</sup> *Sydney Herald*, 1 April 1842.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.* The Solicitor-General even commented that the evidence seemed "conclusive" and that he could see no defence available to the accused. Despite this confidence the accused was acquitted after only a few minutes. The Chief Constable and three JPs had given glowing character evidence on behalf of the accused at trial. The reporter at the trial noted that the jury appeared to have made up its mind at a very early stage of the proceedings, see *Ibid.* It may be significant that, as the Attorney had suggested, the accused and the jurors came from a similar social position.

<sup>73</sup> [1842] TASSupC 4 (*Launceston Courier*, 16 January 1843). See also *Cornwall Chronicle*, 14 January 1843.

<sup>74</sup> [1833] NSWSupC 86 (*Sydney Herald*, 15 August 1833).

<sup>75</sup> *Sydney Herald*, 15 August 1833.

was a Magistrate who was, to use Mr. Therry’s own words, “A man possessing high connexions both here and at home – and a man hitherto enjoying a high reputation.”<sup>76</sup> Mr. Therry assured both the jury and the accused that in presenting the Crown case he “would not willingly deviate from the strict line of professional duty.”<sup>77</sup> In 1837 in *R v Bingle and Were*<sup>78</sup> another Magistrate appeared before the New South Wales Supreme Court, this time charged with theft of cattle. The case had apparent political overtones<sup>79</sup> and the Attorney-General was at pains to assure the jury that in “the exercise of his duty he would make no difference between a gentleman and the meanest person in the Colony.”<sup>80</sup> However, he then proceeded to belie these sentiments in his opening address:

The charge of cattle stealing was always a most serious charge when brought even against persons in the lowest station of life;<sup>81</sup> but when brought against gentlemen – men moving in a respectable sphere of life, one of whom held the honourable and responsible office of a Justice of the Peace – men of large fortune – the jury had a most important duty to perform in investigating it. There should be strong evidence given before the charge could be entertained, to rebut the presumption that men holding the character of gentlemen must be above the low and mean feelings which actuate the minds of those who are guilty of the crime of cattle-stealing, especially when they were men of large fortune, and the causes that often led to the commission of crime could not be supposed to operate. When all these circumstances were combined, it would require strong evidence indeed to rebut their presumptive innocence... If the jury had any preconceived opinions on the case, they must have been formed without knowing the facts of it, and they must decide on the evidence that would be brought before them; on the evidence that would be adduced the case must either stand or fall... He would be sorry to put any case on the testimony of prisoner of the Crown alone; but in the present case he had other testimony. The circumstances of the Colony required that persons should be admitted into the witness-box who would not be admitted in England,<sup>82</sup> but that should make the jury the more circumspect in examining their evidence. *Many of the witnesses were gentlemen, and if they had any feeling in the case it must be in favour of the prisoners, who were gentlemen* [my emphasis].<sup>83</sup>

[3.4.9] These cases and others<sup>84</sup> would seem to suggest that the notion of prosecutorial restraint in Australia, was influenced by a tendency to be sympathetic to “gentlemen,”

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.* Again Mr. Therry’s approach should be contrasted with that adopted by him in *R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald*, 12 August 1840), see below n 223.

<sup>78</sup> [1837] NSWSupC 25 (*Sydney Herald*, 15 May 1837).

<sup>79</sup> The Magistrate at the trial asserted that he was a critic of the Governor and there had been political considerations behind his prosecution. This charge was firmly rejected by both the Attorney-General and the trial judge.

<sup>80</sup> *Sydney Herald*, 15 May 1837.

<sup>81</sup> In other circumstances the theft of livestock was a crime that dictated a robust prosecutorial role. See further the cases cited below at n 235 and n 236.

<sup>82</sup> Some of the prosecution witnesses were convicts.

<sup>83</sup> *Sydney Herald*, 15 May 1837. The accused were acquitted but the jury noted that the conduct of both defendants in the case had “been marked with great impropriety” (*Ibid.*).

<sup>84</sup> See also *R v Durie* [1839] TASSupC 35 (*Cornwall Chronicle*, 12 October 1839) (another reluctant prosecution of a surgeon charged with manslaughter), *R v Jones* (*Sydney Herald*, 19 March 1842) (prosecution counsel emphasised his sympathy for the accused during his trial for killing a horse, noting that the accused was the son

respectable men of standing in the relatively closed confines of early colonial society, as opposed to any unbiased adherence to any overarching concept of the prosecutor as a minister of justice.

[3.4.10] This fairness or undue tenderness (depending on one's perspective) accorded by prosecution counsel was also manifest in cases such as *R v Jamieson*<sup>85</sup> in 1827 and *R v Bolden*<sup>86</sup> in 1841. In *Jamieson* the Acting Attorney-General, Mr. Moore, made clear his reluctance to prosecute a local landowner for the murder of an Aborigine called "Hole-in-the-book" who had allegedly killed and eaten one of the defendant's employees. Mr. Moore even opened his case by adducing in full a lengthy letter that the accused had written to the Governor justifying his actions. In *Bolden* the Crown Prosecutor, Mr. Croke, described the accused, who was charged with shooting an Aborigine with intent to murder, as a "very respectable settler."<sup>87</sup> He explained to the jury that he would not embellish or overstate the prosecution case for "the purpose of prejudicing the minds of the jury" and that he would not do so for as long as he had "the honour to hold the situation" that he presently held.<sup>88</sup> One cannot help but speculate whether in both cases the respectable standing of the defendants and the identity of the victims as Aborigines might not have generated the apparent restraint with which the prosecutors conducted the Crown cases.<sup>89</sup>

[3.4.11] Though prosecutorial restraint (or rather class bias masquerading as restraint) was shown clearly in favour of "respectable" defendants during the period, it is acknowledged that such moderation was not confined to the prosecution of "gentlemen". Even the most unlikely of defendants might, on occasion, benefit from prosecutorial restraint at trial. For example, in the notorious 1824 case, *R v Pearce*,<sup>90</sup> one of the first

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of "a most respectable settler, and his mother who is a very pious and religious lady, was the widow of an officer") and *R v MacKenzie* (*Moreton Bay Courier*, 26 November 1853) (a highly restrained prosecution for manslaughter; the Attorney-General declaring, "The prisoner occupied the position of a gentleman, and held the office of a gentleman to the Bench at Gayndah; and it was painful to see him now standing at the bar before a jury of his countrymen, to take his trial for depriving a fellow creature of his life").

<sup>85</sup> [1827] NSWSupC 31 (*Sydney Gazette*, 18 May 1827).

<sup>86</sup> *Port Philip Patriot*, 6 December 1841.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> It is worthy of note though that Mr. Moore had at least prosecuted Jamieson to the surprise of some quarters (see the commentary in *The Australian*, 18 May 1827) and the fact that the local Magistrates after a full investigation had completely exonerated him. See also *R v Lowe* [1827] NSWSupC 32 (*Sydney Gazette*, 21 May 1827 and *The Australian*, 23 May 1827) where in the face of local resistance and a lack of co-operation in his investigation Mr. Moore unsuccessfully prosecuted an army Lieutenant charged with the murder of an Aborigine. See further Watson, F, (ed) *Historical Records of Australia, Series I, Vol XIII* (Sydney, Library Committee of Commonwealth Parliament, 1919) p 400-401. Similarly, Mr. Croke proceeded with the trial in *Bolden* despite the open hostility throughout the proceedings of the trial judge, Willis J, to the prosecution cause and his conclusion that the Crown had "completely failed" (*Port Philip Patriot*, 6 December 1841) to sustain its case. Bolden was a neighbour of the judge's brother. Croke even remained steadfast, despite strong censure from Willis J for having brought such a prosecution, and insisted that in the face of such evidence as in the present case that he would have brought a thousand such cases to trial, see *Ibid.*

<sup>90</sup> [1824] TASSupC 11 (*Hobart Town Gazette*, 25 June and 6 August 1824). This gruesome case inspired a famed work of historical fiction, see Clark, M, *For The Term of His Natural Life* (reprint) (Sydney, Harper Collins Publishing, 2002) and a recent film, *Van Diemen's Land*. Not only had Pearce murdered and consumed Cox, it

cases to come before the Supreme Court of Tasmania, Gellibrand acted in accordance with notions of prosecutorial dispassion and restraint. The accused was charged with the murder of a fellow convict called Cox whom he had killed and then roasted and consumed during an ill-fated effort to escape from Macquarie Harbour. Despite the horrific nature of the case, the Attorney-General entreated the jury “to dismiss from their minds all previous impressions against the prisoner: as however justly their hearts must execrate the fell enormities imputed to him, they should dutiously judge him, not by rumours – but by indisputable evidence.”<sup>91</sup>

[3.4.12] Even an Aboriginal defendant accused of offences relating to a white victim might benefit from a restrained, even sympathetic,<sup>92</sup> prosecutor. For instance, in 1840 in *R v Billy*<sup>93</sup> where an Aboriginal defendant was tried for the murder of a white man, the Attorney-General, John Plunkett, demonstrated an apparent empathy and fairness that was not always manifest in the prosecution of Aboriginal defendants.<sup>94</sup> The Attorney-General not only suggested that the accused should be legally represented but opened the Crown case by explaining that “there were no cases of a more painful description than those against the Aborigines, who, from their ignorance of our language, manners and customs, as well as of our laws, could only take their trial at a disadvantage, as the state of the law prevented them from calling on others of their tribe to give evidence in their defence.”<sup>95</sup> Plunkett acknowledged that it also frequently happened in cases of “aggression” by the Aborigines, that the first provocation or crime had been provided by the white inhabitants through their “carrying off the gins of these blacks” or otherwise annoying them.<sup>96</sup>

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transpired that on an earlier escape he had also killed and eaten several of his companions. See further Sprod, D, *Alexander Pearce: Convict-Bushranger-Cannibal* (Hobart, Cat and Fiddle Press, 1977).

<sup>91</sup> *Hobart Town Gazette*, 25 June 1824.

<sup>92</sup> Albeit paternalistic by modern standards.

<sup>93</sup> [1840] NSWSupC 78, *Sydney Herald*, 5 November 1840.

<sup>94</sup> See, for example, *R v We-War* [1842] NSWSupC 1 (*Inquirer*, 12 January 1842). See further the discussion in Part 5 (4) of this Chapter.

<sup>95</sup> *Sydney Herald*, 5 November 1840.

<sup>96</sup> *Ibid*. See also *R v Jack & Dick* [1826] TASSupC 9 (*Colonial Times*, 2 June 1826), *R v Boatman* [1832] NSWSupC 4 (*Sydney Gazette*, 25 February 1832) and *R v Dundumah* [1840] NSWSupC 82 (*Sydney Herald*, 10 November 1840) for other instances of prosecutorial fairness in the prosecution of Aboriginal defendants. It should also be remembered that in the face of considerable local resistance colonial prosecutors had insisted in cases such as *R v Jamieson* [1827] NSWSupC 31 (*Sydney Gazette*, 18 May 1827), *R v Lowe* [1827] NSWSupC 32 (*Sydney Gazette*, 21 May 1827), *R v Kilmeister & Ors (No 2)* ([1838] NSWSupC 110 (*The Australian*, 1 December 1838) and *R v Bolden (Port Philip Patriot*, 6 December 1841) on prosecuting white defendants charged with serious crimes directed at Aborigines. However, this reasoning should not be stretched too far. *Jamieson* and *Bolden* were undertaken with prosecutorial restraint. The defendants in *Kilmeister* were convict shepherds rather than respectable “gentlemen” such as squatters or military officers, see Therry, above n 22, 284. It is significant that a massacre of up to 300 Aborigines in early 1838 by military forces under a Major Nunn did not result in any prosecution, see Woods, Ch 2, n 171, 96. It has been argued that the white reaction to the prosecution, conviction and execution of the defendants in *Kilmeister* was so powerful that prosecutors were deterred from undertaking future similar prosecutions, not just in relation to the remaining defendants in *Kilmeister* and Major Nunn, but also in relation to the many other crimes committed on Aborigines by whites during this period, see *Ibid* and Kercher, n 22, 14-15. For a detailed discussion of the wider issues raised by both *Kilmeister* and Nunn’s murderous activities, see Miles, Ch 2, n 326.

[3.4.13] It can be seen that from the 1820s onwards the prosecuting lawyer in Australia was capable of demonstrating the same restraint and even apparent compassion that had come to distinguish the prosecutorial role in England.<sup>97</sup> Even an Aboriginal defendant accused of the murder of a white man as in *Billy* or a notorious convict in a case such as *Pearce* accused of murder and cannibalism might benefit from prosecutorial moderation.<sup>98</sup> However, I would suggest, that such cases were atypical and, for the most part prosecutorial restraint does appear to have been demonstrated in favour of "gentlemen," privileged defendants who occupied positions of respectability in early colonial society. In many such cases the prosecutor may even have expressed reluctance to have preferred charges. In these cases the prosecutor was not so much acting as a judicious minister of justice without reference to the class or status of the defendant as had been claimed by Plunkett in *Donnison* and by Gellibrand in *Tibbs* but rather was demonstrating explicit class bias in favour of a fellow "gentleman" and/or racial prejudice towards the alleged victims. The prosecutorial adoption of the role of a minister of justice appears in practice in Australia to have been highly selective and, as will be shown in the next Part, not all defendants could expect to benefit from the restraints of such a role.

## **Part 5: Prosecutorial Zeal on Display in Australia: The Need to Set an Example in Confronting an "Enemy of Society"?**

### **Part 5(1): Bushrangers**

[3.5.1.1] The confidence of nineteenth century authors such as Sir Showell Rogers<sup>99</sup> that the paramount duty of the prosecutor to act as a minister of justice was faithfully followed can be shown to have been misplaced in practice in Australia. The prosecutorial role in Australia developed on an uneven and inconsistent basis. Until well into the second half of the nineteenth century one can find clear instances of prosecuting counsel ignoring any convention of restraint, and vigorously, if not zealously, urging the conviction of the accused. In Australia this prosecutorial enthusiasm appears to have been most evident in respect of defendants such as bushrangers, convicts, political offenders, Aborigines and rapists or other kinds of sexual offenders. Why were such offenders deemed worthy of prosecutorial fervour in Australia when "respectable" defendants in other cases such as *Lord*, *Wright* and *Bingle and Were* plainly were not? Two factors appear to have been significant. Firstly, there is the obvious point as discussed above that in practice there appears to have been a distinct prosecutorial bias in favour of defendants who were "gentlemen." Secondly, one must have regard to the ever present "fear" factor in early Australia. As one commentator remarked in 1835, "In no country is life so insecure as in this."<sup>100</sup> It is clear that early colonial society felt itself under a very real threat, especially, though by no means exclusively, from bushrangers. As Kercher explains:

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<sup>97</sup> See the discussion in Parts 3 and 8 of Chapter 2.

<sup>98</sup> See also the cases listed above in n 58.

<sup>99</sup> Rogers, Ch 1, n 170, 259-260. See also the commentary to *R v Berens* (1865) 4 F & F 843, n (b) to similar effect.

<sup>100</sup> "Irwin on Western Australia" (1835) 7 *Dublin University Magazine* 157.

Bushranging was a violent challenge to the official view of colonial Australia. The countryside was utterly alien to those who had been born in Europe. In the frontier years especially, there were only occasional paddocks surrounded by the endless ancient bush, with its venomous snakes and spiders, and hidden Aboriginal spears. The bush was much more violent than Britain or Ireland. Familiar and safe, the old countries had only occasional patches of forest among closely settled fields and towns, and no terrifying snakes or spears. When convicts turned themselves into the first bushrangers, they added to the dangers of the bush and challenged the official policies of close surveillance and discipline, and reform through hard work.<sup>101</sup>

[3.5.1.2] This observation illustrates the sense of vulnerability that the early officials and settlers in Australia felt. They were alone at the other side of the world from “home” surrounded by a host of potential perils. In a society so heavily composed of convicts<sup>102</sup> there was always fear of a breakdown of, what was described by Deputy Advocate-General Wilde in 1821 as, the “sense of Restraint and Coercion, which may be urged to keep the Prisoners of the Crown, so comparatively numerous here, in proper awe and subjugation.”<sup>103</sup> The acute sense of isolation and threat to early colonial society is significant in explaining why certain offenders were regarded as posing not just a challenge to the maintenance of colonial law and order but as a very real threat to the existence of colonial society. This background is central to understanding why in certain cases in Australia, prosecution counsel discarded the role of the minister of justice. Though there were cases in England in the 1790s and 1800s where prosecution counsel seems to have acted with similar zeal in confronting defendants whose alleged crimes may have challenged the established social order,<sup>104</sup> my research suggests that this trend appears to have been more explicit and pronounced in Australia than in England.<sup>105</sup> For certain offenders, regarded as “enemies of society” in Australia, the adoption by the prosecutor of a partisan and zealous role that was bent solely on securing their conviction was seen as not only justified but also as necessary. Though a range of defendants might find themselves branded as an enemy of society and at risk of prosecutorial vigour it is clear that prosecutorial enthusiasm in Australia was most evident in respect of defendants who belonged to groups and/or who were charged with offences that were regarded as especially “beyond the pale” and as representing a particular threat to colonial society. Though convicts, political offenders, Aborigines and rapists could be, and were, regarded in these stark terms it was bushrangers, as Kercher suggests, who appear to have been viewed by both colonial society and prosecutors as

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<sup>101</sup> Kercher, above n 22, 103-104.

<sup>102</sup> In 1824 when the Supreme Court of Tasmania was established about half of Tasmania’s white population were convicts. Even as late as 1847 34% of the island’s white population were convicts, see Davis, J, *The Tasmanian Gallows: A Study of Capital Punishment* (Hobart, Cat & Fiddle Press, 1974) p 255. In NSW in 1820 45% of the white population were convicts but even as late as 1840 29% of the population were convicts, see Neal, D, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, Cambridge University Press, 1991) p 200.

<sup>103</sup> See Hughes, above n 8, 231.

<sup>104</sup> Such cases as *R v Patch*, Ch 2, n 36 (the murder of a social “superior”), *R v Vaughan*, Ch 2, n 112 (grave robbing) and *R v Courvoisier* Ch 2, n 269 (the murder by a servant of his aristocratic employer) discussed in Chapter 2 fall within this category.

<sup>105</sup> See the cases cited in Chapter 2 at n 104 and n 106 where counsel in England acted with moderation despite prosecuting defendants who could be regarded as potential “enemies of society.”



posing the greatest threat to early society and therefore to be most deserving of prosecutorial zeal.

[3.5.1.3] This point was made clear in 1824 in *R v Thompson and Others*.<sup>106</sup> In this case the defendants were convicts who had committed further offences in Tasmania and had been "banished" to the notorious penal station at Macquarie Harbour from which they had escaped. They had then committed various robberies as bushrangers.<sup>107</sup> The Attorney-General lamented the fact that crime was increasing in the colony "faster than law could record or justice pursue."<sup>108</sup> He asserted that he "would not state anything in needless aggravation"<sup>109</sup> of the defendants but then proceeded to contradict this assertion with the following exhortation:

...he must be permitted to contend that if he proved that guilt, and it were suffered to escape condign punishment, then would the property and even lives of all the respectable community be endangered...It really was not to be indured [sic] that public tranquility should be outraged, and the repose of individuals destroyed by callous desperadoes, who, from previous escapes, through judicial lenity, seemed encouraged to perpetrate further misdeeds, and have an ignominious end, rather than 'to turn from their wickedness, and live.'<sup>110</sup>

[3.5.1.4] In *R v Stanley and Tullis*<sup>111</sup> in 1841 the Attorney-General of Tasmania also departed from any role of a minister of justice in stating the case to the jury and went even further than his predecessor had in *Thompson* in urging the jury to make an example of two alleged bushrangers and not to be dissuaded in their task by the fact that the accused faced a capital offence of robbery under arms. The Attorney "repudiated the indulgence of any sickly affection respecting capital punishment, or the influence of any sickly sentimental feelings on the mind of the jury."<sup>112</sup> The Attorney stressed that the government was determined to enforce the law "against all persons found guilty of roaming about the colony, committing acts of violence and plunder upon the settlers" and that it would be "cruel indeed to the settlers were they thus not protected by the Government."<sup>113</sup>

[3.5.1.5] A similar theme is evident in *R v Shea and Others*<sup>114</sup> during the trial of several bushrangers who were charged with murder. The Attorney-General proved unable to contain his enthusiasm and took the occasion to point to the need to make an example of

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<sup>106</sup> [1824] TASSupC 15 (*Hobart Town Gazette*, 25 June 1824).

<sup>107</sup> *Hobart Town Gazette*, 25 June 1824.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *The Courier*, 27 April 1841.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.* The defendants escaped the death penalty after the victim was found unable to give sworn evidence.

<sup>114</sup> [1841] NSWSupC 7 (*Sydney Herald*, 25 February 1841 and *The Australian*, 25 February 1841).

such offenders.<sup>115</sup> He proclaimed his indignation that the prisoners, who had been transported originally to Australia as convicts, had ventured beyond the “pale of the law” and had again embraced a life of crime:

All of the prisoners... had extended to them the indulgence of being assigned to individuals, who, by Government regulations were bound to treat them with a leniency and a kindness unknown to the law except in modern times, a leniency and kindness which they had no right to expect. Upon this however the prisoners appeared to have set no value, but shown themselves to be incorrigibly bad, for they combined together to keep the whole country from the sea coast to the Liverpool Plains, in a state of terror and confusion, and excite a degree of fear in the breasts of all Her Majesty’s subjects residing in that part of the Country...they [the jury] would find that no matter what part they took in the transaction [the murder] all were guilty. The result of the case he hoped would be a further proof that the first step to the gallows is for a convict to become a bushranger and that however long he may escape with impunity, the law is strong enough and is sure eventually to overtake and punish him.<sup>116</sup>

[3.5.1.6] Even the case of the outlaw, “Ned” Kelly, can, perhaps, be seen in such a light.<sup>117</sup> Kelly was charged with the murder of a police constable arising from a notorious incident in which three police officers had been murdered. The highly publicised<sup>118</sup> criminal activities of Kelly and his gang had clearly alarmed the Victorian authorities.<sup>119</sup> This might explain why prosecution counsel appears to have conspicuously discarded any notion of detached restraint in the conduct of the case. As Keneally notes, “The Crown appeared to be thirsting for Ned Kelly’s blood.”<sup>120</sup>

[3.5.1.7] This prosecution partisanship was manifest even in the committal proceedings.<sup>121</sup> The prosecution were represented in force through Mr. Chomley (the senior Crown Prosecutor), a Mr. Smyth (who would act as trial counsel), the Crown Solicitor (the highly experienced Mr. Gurner), the Police Commissioner and much of the Colony’s police force. Kelly was represented by a single lawyer, a Mr. Gaunson, who had only just been instructed to appear in the case. Mr. Gaunson sought the adjournment of the proceedings on the basis that Kelly was on trial for his life, and that it was necessary

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<sup>115</sup> See also *R v Whitton* (*Sydney Herald*, 26 February 1840) where similar sentiments about bushrangers were expressed by both the prosecutor and the trial judge. Both emphasised the need to deter others who may also have been inclined to become bushrangers. See also *R v Greary*, (*Sydney Gazette*, 18 August 1821).

<sup>116</sup> *Sydney Herald*, 25 February 1841.

<sup>117</sup> There is an argument that the crimes of the Kelly Gang can be viewed in a political light. The author does not wish to enter into one of Australia’s longest running historical debates as to the status of Kelly. As Jacobs notes, “Many people thought – and still think – that they [the Kelly gang] were more sinned against than sinning” (see Jacobs, P, *Famous Australian Trials* (Melbourne, Robertson & Mullens Ltd, 1942) p 78). I, like Jacobs, consider that it is best to “let others decide whether this is true” (*Ibid*).

<sup>118</sup> The gang’s activities attracted intense press scrutiny throughout Australia, see Castles, A & Castles, J, *Ned Kelly’s Last Days: Setting the Record Straight on the Death of an Outlaw* (Crow’s Nest, Allen and Unwin, 2005) p 80-88.

<sup>119</sup> See Jones, I, *Ned Kelly: A Short Life* (Port Melbourne, Lothian Books, 1995) p 173, 210-227, 283 and 301.

<sup>120</sup> Keneally, J, *The Complete History of the Kelly Gang and their Pursuers* (Robertson & Mullen, Melbourne, 1955) p 282.

<sup>121</sup> See the report of the proceedings in *R v Kelly*, *The Age*, 7 August 1880, p 5 and 6. See also Jones, above n 119, 293.

in order to prepare his client's defence and that he had not been provided with the evidence of the prosecution witnesses. He pointed out that while he was there alone and unaided and without instruction or advice, the prosecution were present in considerable force. Mr. Smyth opposed this application. He asserted that if Mr. Gaunson wanted to know the evidence of the prosecution witnesses then those witnesses had not long ago been examined at the inquest and their accounts could be found in the newspapers and that this was not even the place for Kelly to present his defence. Mr. Gaunson observed he had not read the newspaper accounts and how could he properly cross-examine the prosecution witnesses at committal unless he knew all the facts of the case? He described the prosecution contention that this was not the place to present Kelly's defence as unwarranted by law and contrary to common sense.<sup>122</sup> The magistrate had a duty only to commit Kelly for trial if he was satisfied that a *prima facie* case existed.<sup>123</sup> Mr. Gaunson asserted that Kelly had been treated as a "wild beast" and not as a "human being"<sup>124</sup> and protested at the "monstrous tyranny"<sup>125</sup> that Kelly had been denied any visitation rights from his relatives. At this point Mr. Gurner, the Crown Solicitor, appears to have questioned Gaunson's right even to be present on Kelly's behalf. The ensuing exchange between the opposing lawyers prompted Mr. Gaunson to predict that, optimistically as events would transpire, "If this is to be the style of the prosecution, the prisoner will be acquitted."<sup>126</sup>

[3.5.1.8] The Crown's determination to secure a conviction was also entirely obvious at the trial.<sup>127</sup> From the beginning of Mr. Smyth's opening address, "The fact that Ned Kelly was on trial not for murder of a policeman, but as an enemy of society, was made very clear."<sup>128</sup> This theme was sustained by Mr. Smyth during his closing address. He vehemently urged the jury to reject Kelly's defence that he may have been acting in self-defence and branded Kelly an "assassin" who had been "leading a wild lawless life, and was at war with society."<sup>129</sup> Kelly was motivated by a "malignant hatred against the police" and appeared to "glory" in his murder of the officers.<sup>130</sup> Mr. Smyth, perhaps with one eye on posterity, concluded his address by appealing to the jury in the following terms:

The prisoner wanted to pose before the country as a hero, but he was nothing less than a petty thief, as was shown by the fact that the gang rifled the pockets of the murdered

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<sup>122</sup> See the report of the proceedings at *The Age*, 7 August, 1880, p 5 and 6.

<sup>123</sup> This is a correct opinion of the major changes brought about by "Lord Jervis' Act" as to committal proceedings.

<sup>124</sup> *The Age*, 7 August 1880, p 5.

<sup>125</sup> *The Age*, 7 August 1880, p 6.

<sup>126</sup> *The Age*, 7 August 1880, p 6. See also Jones, above n 119, 293 and Phillips, J, *The Trial of Ned Kelly* (Sydney, Law Book Co, 1987) p 11-12.

<sup>127</sup> See *The Age*, 19, 29 and 30 October 1880 and the *Argus* 19, 20 and 30 October 1880 and Phillips, above n 126, for detailed accounts of the trial.

<sup>128</sup> Jones, above n 119, 304.

<sup>129</sup> *The Age*, 30 October 1880. The recitation of Smyth's closing speech by Phillips, above n 126, 72-75, is considerably edited.

<sup>130</sup> *The Age*, 30 October 1880.

men. The murders committed were of a most cowardly character, and the prisoner had shown himself a coward throughout his career. The murders that he and his companions committed were of a most bloodthirsty nature. They never appeared in the open excepting [when] they were fully armed and had great advantage over their victims.<sup>131</sup>

[3.5.1.9] The zeal with which counsel undertook the prosecution of bushrangers in cases such as *Thompson, Shea* and *Kelly* was not atypical.<sup>132</sup> Such prosecutorial enthusiasm may be explained by the fact that not only were the “outrages”<sup>133</sup> of the bushrangers a recurring threat to law and order in Australia throughout most of the nineteenth century,<sup>134</sup> but at various times their activities raised wider fears. Bushrangers were viewed as more than mere outlaws and on more than one occasion represented a real menace to the entire social order in colonial society.<sup>135</sup> In Tasmania they became a “social force”<sup>136</sup> and until 1826 their long “predatory career”<sup>137</sup> was of such an extent that it had threatened the “most serious consequences”<sup>138</sup> and had occasioned the “great injury of the best interests of this infant Colony.”<sup>139</sup> The settlers and officials “were sure the convict population was ready to rise and join the bushrangers, consigning Van Dieman’s Land to anarchy.”<sup>140</sup> Boyce asserts that the fears held by the authorities of the extent of the threat posed by bushrangers to Tasmania “is not 19<sup>th</sup> century hyperbole.”<sup>141</sup> Similarly, the activities of bushrangers in New South Wales were a source of recurring concern that extended beyond their challenge to law and order or threat to the livelihoods of certain

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<sup>131</sup> *Ibid.*

<sup>132</sup> See also the prosecution of bushrangers in *R v Evans* [1824] TASSupC 21 (*Hobart Town Gazette*, 12 November 1824) (a highly emotive prosecution), *R v Read & Lancaster* (*Cornwall Chronicle*, 15 April 1843) (where emphasis was placed on the “heinousness” of the offence), *R v Reid & Ors* (*Colonial Times*, 2 April 1844) (where there was reference to the prevalence of bushranging), *R v Whelan* (*Colonial Times*, 10 December 1847 and *The Courier*, 11 December 1847) (strong prosecution opening address in the trial of a notorious but legally unrepresented bushranger charged with murder), *R v Dalton & Kelly* (*Launceston Examiner*, 9 April 1853) (impassioned prosecution of two notorious escaped convicts and bushrangers who had murdered a police constable during a robbery at the home of Simeon Lord, a respected merchant and Magistrate) and *R v Fordyce & Ors* in 1863 (see Thurgood, N, *The Gold Escort Robbery Trials* (Kenshurst, Kangaroo Press, 1988) p 18-21) (during the trial of three bushrangers accused of a “flagrant and atrocious” armed robbery of a large gold shipment, the Attorney-General, in a robust opening address, asked the jury if they could “possibly conceive of a crime more hostile to the peace and well-being of society at large than this” (*Ibid*, 18).

<sup>133</sup> See Editorial, “The Bush-Ranger: Dreadful Outrages and Murder!,” *Colonial Times*, 10 March 1826, p 2. Therry commented that bushrangers had been the “terror” (Therry, above n 22, 43) of New South Wales and in the 1830s it had been “positively perilous to venture from Sydney, in consequence of the daring of the bushrangers” (*Ibid*, 123).

<sup>134</sup> Bushrangers continued to pose major problems into the second half of the 1800s, see Woods, Ch 2, n 171, 203-206 and Parkes, H, *Fifty Years in the Making of Australian History* (London, Longmans, 1892) p 180-186.

<sup>135</sup> See Hughes, above n 8, 203-243; Editorial, above n 133; Editorial, *Colonial Times*, 14 April 1826, p 2; Woods, Ch 2, n 171, 77-78 and Castles, above n 18, 79-80.

<sup>136</sup> Hughes, above n 8, 234.

<sup>137</sup> Editorial, above n 135.

<sup>138</sup> Editorial, above n 133.

<sup>139</sup> Editorial, above n 135. See further Robson, L, *A History of Tasmania* (Oxford, Oxford University Press, 1983) p 78-105.

<sup>140</sup> Hughes, above n 8, 228. See also Boyce, J, *Van Diemen’s Land* (Melbourne, Black Inc, 2008) p 71-83.

<sup>141</sup> *Ibid*, 74.

sectors of society.<sup>142</sup> As Hughes notes, even when the worst of the bushrangers had been suppressed in Tasmania, in New South Wales “the bandits continued to pillage and present their threats to the law, reminding convicts and awakening the fears of their masters that chains were made to be broken.”<sup>143</sup> Similar fears remained in Tasmania.<sup>144</sup>

## Part 5(2): Convicts

[3.5.2.1] It was not only bushrangers who were treated as a threat to colonial society that justified a robust prosecution approach. Convicts were also viewed in these terms.<sup>145</sup> There was a sense that the “respectable” classes in Australia were beset with criminals and crime. As Montagu J in 1847 during the trial for burglary with violence of a former convict from Port Arthur observed, “We are surrounded with thieves, burglars and other offenders of the deepest criminality.”<sup>146</sup> His Honour, in a far from flattering description of Tasmania, considered that, “A worse community with especial reference to the very large population of the convict population never existed on the face of the globe than in this island, at all events never in the history of modern times.”<sup>147</sup> It was of the utmost importance in such a society composed so heavily of convicts or former convicts to deter the commission by them of further offences in Australia. This theme was manifest in 1832 in *R v Oxley*.<sup>148</sup> The accused was a convict who had been charged with escape from a prison hulk. At first glance this might not seem to have been the most serious crime in the Tasmanian criminal calendar. However, the consequences in a strict penal colony of escaping convicts, particularly if they committed further crimes, especially of bushranging, were obvious.<sup>149</sup> Therefore, in *Oxley*, the Attorney-General displayed a marked lack of restraint and implored the jury to make an example of the accused:

... for so sure as he is found guilty of the charge exhibited against him, (as I expect he will) so sure he goes from here to the gallows. It is high time that an effective check

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<sup>142</sup> See Hirst, J, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Sydney, Allen & Unwin, 1988) p 217-241 and Woods, Ch 2, n 171, 203-206.

<sup>143</sup> Hughes, above n 8, 234.

<sup>144</sup> Boyce, above n 140, 77.

<sup>145</sup> See, for example, Mudie, J, *The Felonry of New South Wales* (Melbourne, Landsowne Press, 1964) p 113 and 116.

<sup>146</sup> *R v Kenney*, *The Courier*, 6 March 1847, p 3. See also Davies, above n 102, 40.

<sup>147</sup> *The Courier*, 6 March 1847.

<sup>148</sup> [1832] TASSupC 32 (*Tasmanian*, 7 December 1832). See also *R v Burgess* [1824] TASSupC 28 (*Hobart Town Gazette*, 10 December 1824) – a burglary trial in which the prosecutor described “the magnitude and ruinous frequency of burglarious pillage in the Colony”; *R v Benson* (*Sydney Gazette*, 27 January 1825) – the Solicitor-General in a highly emotive prosecution of convict servants for petit treason (see further Chapter 2, n 39) and the murder of their master even sought divine inspiration for his advocacy; *R v Broadhead & Ors* (*Colonial Times*, 2 September 1825) – the “vital importance” of putting an end to the crime of robbery at night of a dwelling which was “one of the most dangerous tendency in a Colony” where most of the settlers were in the “most isolated and defenceless condition”; *R v Hitchcock & Ors* [1833] NSSWSupC 114 (*Sydney Gazette*, 10 and 12 December 1833) – a robust prosecution of convict servants who had mutinied against their notorious employer at “Castle Forbes”; and *R v Burdett & Ors* (*Sydney Morning Herald*, 17 July 1844) – a highly emotive prosecution of three men accused of committing an armed burglary of a house on a Sunday “in the heart of the City of Sydney” and murdering the householder as he was reading his prayers and was just about to attend Church.

<sup>149</sup> Most early bushrangers were escaped convicts. It is unsurprising that by 1830 it was a capital offence in Australia to escape from a penal settlement, see Davies, above n 102, 28.

should be put to the desperate and lawless proceedings of persons of the prisoner’s description in a penal Colony like this, surrounded as we are by the most abandoned characters. What safety can be there for lives or property? When I reflect on the situation which I hold, it is astonishing how my life or my house is safe among them – men whom it appears spend their time in planning schemes of escape and plunder, and who evade the watchfulness of the most vigilant guards. I wish that every convict in the Colony would hear me, when I say that the mercy which has been so often and so wantonly abused, will not be extended in the future: and as I see there is a Reporter here from the Public Press, I do request that he will put this case, with what I say, before the public, and especially before the prison population.<sup>150</sup>

[3.5.2.2] Nor was the threat of the commission of further crimes by convicts the sole issue that troubled colonial society. The ever present spectre that always loomed large in colonial society was, as Hughes notes, “a *jacquerie*, the convicts’ revolt that had figured in the nightmares of Australian settlers and governors since the Irish rose at Toongabbie in 1804.”<sup>151</sup> Thus in relation to the prosecution of such convicts one can observe a passion at odds with any role of the prosecutor as the restrained minister of justice. In 1834 in *R v Douglas and Others*<sup>152</sup> the defendants were convicts who faced charges arising from a plot to stage a revolt on Norfolk Island. The prosecution counsel noted that the object of this “most daring conspiracy” had been to kill the garrison, violate the females of the island and then escape.<sup>153</sup> The prosecutor declared his relief at the failure of this “diabolical conspiracy” but such must be the fate of any such plot “where the projectors are bad men combining together for wicked a purpose, and having opposed to them the brave men who compose the soldiery, and who fight in a good cause.”<sup>154</sup>

[3.5.2.3] A similar prosecutorial enthusiasm was manifest in the trials in Victoria in 1857 of a number of convicts who were accused of the brutal murder during a prison riot of John Price, the Superintendent of Victoria’s prisons and the notorious former governor at Norfolk Island. In *R v Maloney and Others*<sup>155</sup> the Attorney-General noted that the defendants were unrepresented and that he would take care to avoid injuring their cause but that he could not put the Crown case as “otherwise than one of barbarous and cruel murder.” He portrayed a “scene of barbarity and cruelty rarely if ever equalled”<sup>156</sup> by the murder and emphasised the extensive injuries of the deceased. He expressed his surprise, not that they had proved fatal, but that the deceased had lingered for so long.<sup>157</sup> In *R v*

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<sup>150</sup> *Tasmanian*, 7 December 1832.

<sup>151</sup> Hughes, above n 8, 234. Hughes is referring to the Irish convict rebellion at Castle Hill in 1804. There was a particular fear of the Irish convicts, see *Ibid.*, 181-195 and Moore above n 10, 101-120. As Naidis notes, “Every Irish convict was thought to harbour treason, treachery and murder,” see Naidis, M, “Review: The Women of Botany Bay: A Reinterpretation of the Role of Women in the Origins of Australian Society” [1991] *Am His Rev* 588. Hirst disagrees and asserts that the rulers and local colonists in Australia did not live in fear and were remarkably untroubled by thoughts of a convict rebellion, whether by the Irish or otherwise, see Hirst, J, *Convict Society and its Enemies* (Sydney, Allen & Unwin), 1987) p 135.

<sup>152</sup> [1834] NSWSupC 81 (*Sydney Gazette*, 13 Sep 1834).

<sup>153</sup> *Sydney Gazette*, 13 September 1834.

<sup>154</sup> *Ibid.*

<sup>155</sup> *The Age*, 14 and 15 April 1857, p 5-6.

<sup>156</sup> *The Age*, 14 April 1857, p 5.

<sup>157</sup> *Ibid.*

*Brannigan and Others*<sup>158</sup> the Solicitor-General noted that the duty of the prosecutor was to “make the evidence as complete as possible” and reminded the jury that they had a “duty of mercy to perform to society, which must be protected from the commission of such terrible crimes”<sup>159</sup> as those alleged against the prisoners.

[3.5.2.4] In contrast to cases such as *Lord, Wright* and *Bingle and Wear* the defendants in cases such as *Douglas, Oxley* and *Shea* were manifestly not “gentlemen” and were additionally regarded by prosecution counsel as belonging to a class of offenders who posed a real threat, not just to law and order, but potentially to the very existence of colonial society.

### Part 5(3): Political Offenders

[3.5.3.1] Other Australian prosecutors of the period were similarly zealous when confronting defendants who were regarded as enemies of society. Political offenders might fall into this category. The conduct of William Stawell, the Attorney-General of Victoria, during the State Trials in Victoria of 1855 of the thirteen defendants charged with high treason arising from the Eureka Stockade, can be seen in this light. It is clear that Governor Hotham and the authorities in Victoria saw the protests that culminated in the Eureka Stockade not, as is the general consensus of historians, as a localised grievance but as part of a wider plot by “a numerous band of foreign anarchists and armed ruffians”<sup>160</sup> to incite revolt and revolution and march on Melbourne in order to overthrow the government.<sup>161</sup> Stawell also seems to have viewed the participants in the Eureka Stockade in the same light and to have been determined to make an example of the thirteen defendants. He declared that “so long as we are interested in the maintenance of law and order, so long must we feel the greatest and deepest importance in the result of a trial of this kind.”<sup>162</sup> Stawell insisted, in the face of much criticism,<sup>163</sup> on indicting all of the defendants on the capital count of high treason. Indeed, Stawell attracted considerable criticism for his whole conduct of the prosecution of the Eureka Stockade

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<sup>158</sup> *The Age*, 21 April 1857, p 3.

<sup>159</sup> *Ibid.* See also *R v Langham* (*Colonial Times*, 26 July 1842) where the accused was a convict charged with a serious assault upon an inmate at Port Arthur after he had been acquitted the day before of a capital assault upon the medical officer at Port Arthur. The Attorney-General defended capital punishment and remarked “in a very feeling manner upon the ferocious brutality of the prisoner” (*Ibid*) and ascribed inhuman motives for the crime as would befit a beast.

<sup>160</sup> See *The Age*, 5 December 1854, p 4, quoting a Colonel Macarthur.

<sup>161</sup> See Rushden, G, *History of Australia (Vol ii)* (Melbourne, 1884) p 680; Serle, G, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Melbourne, Melbourne University Press, 1963) p 173 and dispatch from Sir Charles Hotham to Sir George Gray dated 20 December 1854 reproduced in “Eureka Documents” in Smith, F, (ed) *Historical Studies: Eureka Supplement* (2<sup>nd</sup> ed) (Melbourne, Melbourne University Press, 1965) p 28 at 33. Though it is beyond the province of this Thesis to embark upon a detailed consideration of the causes of the Eureka Stockade, historians generally agree that it was motivated by genuine resentment at the high licence fee to dig for gold and corrupt and heavy handed local officialdom rather than by any revolutionary desire to overthrow the colonial government. See Turner, H, *Our Little Rebellion: The Story of the Eureka Stockade* (Melbourne, Whitcombe and Tombs, 1912) p 15-46 and Searle, G, “The Causes of Eureka” in Smith, n 161, 42-54.

<sup>162</sup> Stawell, W, 22 February 1855 quoted at the “Eureka on Trial” site of the Public Record Office of Victoria available online at: <http://eureka.imagineering.com.au/home.htm>.

<sup>163</sup> See *The Age*, 26 February 1880, p 4 and *South Australian Register*, reproduced in *The Age*, 16 March 1855, p 6.

trials and was denounced as “The Counsel of Ahitophel.”<sup>164</sup> He was accused of being bent on securing a conviction at all costs and of acting in a manner that was reminiscent of the vindictive style of the prosecutors in the notorious treason trials of the seventeenth century.<sup>165</sup> A scrutiny of the Eureka Stockade trials confirms that some of the criticisms levelled at Stawell are justified, even making allowance for the political motivation behind some of them.<sup>166</sup>

[3.5.3.2] The first of the Eureka Stockade defendants to face trial was a black American man called Joseph. Though it appears that Stawell played no part in the decision to make Joseph the first defendant to face trial,<sup>167</sup> the prosecution’s choice of Joseph as one of the thirteen defendants is curious.<sup>168</sup> Joseph did not play an influential part in the affair and, in the words of his counsel, Mr. Aspinall, was “admittedly no ringleader.”<sup>169</sup> One might speculate, as Mr. Aspinall did, that the prosecutorial choice of Joseph as a defendant was not a coincidence and that he had been “chosen in the hope that an English jury would have no objection to convicting a black man.”<sup>170</sup> Though Stawell denied any suggestion that his choice had been motivated by the desire that as a “man of colour” Joseph would merit the least consideration from the jury,<sup>171</sup> it is instructive to note Stawell’s partisan approach at Joseph’s trial. He was at pains to exclude from the jury anyone whom he thought may have been sympathetic to the cause of the defendant. *The Age* noted, “The Crown challenged every Irishman, every labourer, and every publican. Remember that! Irishman, labourers, publicans!”<sup>172</sup> During his opening address at the trial Stawell continued in a similar style and exhorted the jury that if such conspiracies as those alleged against Joseph were allowed to continue unchecked then “there would be no saying how many wrong headed men, acting with zeal; but misguided zeal, might be led

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<sup>164</sup> Editorial, “The Counsel of Ahitophel,” *The Age*, 28 February 1855, p 4. The “Counsel of Ahitophel” is a Biblical reference to a counsel known for his treachery, the “brother of insipidity and impiety” (*Ibid*).

<sup>165</sup> See *The Age*, 27 February 1855, p 4, 28 February 1855, p 4 and 21 March 1855. See also Part 2 of Chapter 2.

<sup>166</sup> *The Age* was highly critical of Stawell but it must be borne in mind that it was sympathetic to the cause of the miners. By contrast the conservative *Argus* was generally sympathetic to the official line on the Eureka Stockade but even it was critical of aspects of the prosecution, see Editorial, *The Argus*, “The State Trials,” 28 February 1855, p 4.

<sup>167</sup> Serle notes that it seems that it was “by chance” that Joseph was the first defendant to be tried, see Serle (1963), above n 161, 174. Potts suggests that it was a deliberate choice by the defence, see Potts, D and Potts, A, “The Negro and the Australian Gold Rushes, 1852-1857” (1968) *Pac His Rev* 381 at 395. See also Atkinson, J and Roberts, D, ““Men of Colour”: John Joseph and the Eureka Stockade Treason Trials” (2008) 10 *Jour Aus Col His* 75-98.

<sup>168</sup> It is curious that while several white Americans who had been arrested for suspected involvement in the disturbances were released to avoid any diplomatic incident Joseph remained in custody, see Serle (1963), above n 161, 174 and Potts and Potts, above n 167, 393-394. Joseph was an “interesting exception” and remained in prison till his trial, see Churchward, L, “Americans and other Foreigners at Eureka” in Smith, above n 161, 78 at 82-85.

<sup>169</sup> See the report of the trial; *R v Joseph*, *The Age*, 24 February 1855, p 4-5 and 26 February 1855, p 5 and *The Argus*, 23 February 1855, p 5.

<sup>170</sup> *The Age*, 26 February 1855, p 5.

<sup>171</sup> See Stawell’s closing address in the last State Trial; *R v Read & Ors*, reported in *The Age*, 28 March 1855, p 5.

<sup>172</sup> See the discussion of Joseph’s trial in Editorial, *The Age*, 24 February 1855, p 4.



into the commission of the most dreadful crimes and outrages.”<sup>173</sup> Such appeals evidently did not impress the jury. Joseph was acquitted.

[3.5.3.3] Undeterred by Joseph's acquittal, Stawell behaved in a similar manner during *R v Manning*,<sup>174</sup> the trial of the second defendant. In his closing address Stawell left “no stone unturned” in his desire to secure the conviction of the accused.<sup>175</sup> He expressed various personal opinions about the evidence<sup>176</sup> and referred to the dire consequences of the “insurrection” had it succeeded and had the participants achieved their purported aim of setting up an alternative government:

Unfortunately, they [the jury] knew that if one part of a country is disturbed, the rest would very shortly become so. He reminded them if an armed force prevailed, all government was at an end: and if they had prevailed what resistance could they in Melbourne have offered to these goldfields...half the woes, half the bloodshed attendant on high treason would not be occasioned with merely a change of government intended. We are all restrained by Government, we all give up a certain amount of liberty for the benefit of all, and we gain a certain amount of good by it. These men could not offer a better bait than freedom from all Government altogether.<sup>177</sup>

[3.5.3.4] Not content with this skewed exhortation, the Attorney-General then offered the bizarre suggestion that as the troopers had acted with mercy and “extreme forbearance”<sup>178</sup> in quelling the disturbance,<sup>179</sup> this was a factor that the jury should take into account in considering the guilt of the accused.<sup>180</sup> Stawell asserted that the troopers were “entitled” to the jury's “very serious consideration” as it was difficult to contain men with arms in their hands, even the troopers, at the moment of their victory!<sup>181</sup> This argument was dismissed with unreserved scorn by *The Age*:

The argument of the learned gentleman implies (if it means anything) that a victorious soldiery are at liberty to shoot and bayonet men who have ceased to resist, and unconditionally surrendered, and that the forbearance displayed on those occasions was such as ought to be rewarded with the spectacle of a gibbet erected for the unhappy dozen to whom Government have been magnanimous enough to confine their prosecutions.<sup>182</sup>

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<sup>173</sup> *The Argus*, 24 February 1855, p 5. See also the report of the trial *The Age*, 24 February 1855, p 4 which noted Stawell's comment as, “If one man was allowed to conspire in this way, there would be no saying how many wrong headed men would follow his example.”

<sup>174</sup> See *The Age*, 27 February 1855, p 4 and 5 and *The Argus*, 27 February 1855, p 5, for detailed reports of the trial.

<sup>175</sup> Admittedly this was in response to an impassioned speech by defence counsel.

<sup>176</sup> This was one of the prosecutor's actions in *R v Livermore* (2006) 67 NSWLR 659 that so attracted the court's ire.

<sup>177</sup> *The Age*, 27 February 1855, p 5.

<sup>178</sup> *Ibid.*

<sup>179</sup> Not only was this appeal quite irrelevant but it was wrong. Contemporary accounts comment on the brutal and indiscriminate use of force by the authorities in the suppression of the revolt, see Turner, above n 161, 78-81.

<sup>180</sup> *The Age*, 27 February 1855, p 5.

<sup>181</sup> *Ibid.*

<sup>182</sup> *The Age*, 27 February 1855, p 4.

[3.5.3.5] Manning was also acquitted. Still undeterred, the Attorney-General adjourned the proceedings at this point to enable a fresh panel of potential jurors to be summoned and made clear his intention of persisting with the trial of the remaining defendants. Stawell explained that although it was not for him to question the verdicts in either *Joseph* or *Manning*, he possessed "very strong feelings on the subject himself."<sup>183</sup> He therefore "did not feel at liberty to submit them [the remaining defendants] to the same panel" as had dealt with Joseph and Manning.<sup>184</sup> Stawell evidently hoped that a fresh jury panel might prove more sympathetic to the prosecution case than the first two juries had proved to be. This appears to have been a blatant effort on Stawell's part to secure a more "respectable," if not "stacked," pool of jurors for the remaining trials.<sup>185</sup> Mohony has described Stawell's actions as a "gross perversion of justice"<sup>186</sup> that indicated that the colony's chief law officer "was not above perverting justice to obtain his own ends."<sup>187</sup> It is unsurprising that this tactic was, as Mohony notes, widely criticised at the time, even by the usually pro-government *Argus*.<sup>188</sup> The *Ovens and Murray Advertiser* in a typical observation noted the "universal surprise" at Stawell's action and commented that it had "engendered a general feeling of disgust at the 'fast and loose' manner in which the Government has treated this matter."<sup>189</sup>

[3.5.3.6] At the trial of the third defendant in *R v Hayes*,<sup>190</sup> Stawell again engaged in "an exemplary display of bloodthirsty zeal"<sup>191</sup> and in his closing address resorted to overblown rhetoric in an effort to appeal to the jury. The defence had raised the question of what kind of government the "insurgents" would have set up had they really been intent on overthrowing the colonial authorities.<sup>192</sup> In such an unlikely event Stawell predicted dire consequences of anarchy:

Now it was a fact well known that men acting in cases like these would not wish to substitute any government at all for the Government they subverted. Their most seductive answers to the questions of those wishing to join them would be, we are to have no Government at all. This would be the most captivating mode of gaining adherents.<sup>193</sup>

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<sup>183</sup> See the report to *The State Trials* in *The Age*, 28 February 1855, p 5. It is illustrative to compare how such an expression of personal opinion, even outside of court, by a modern prosecutor would not be countenanced by a court and would be likely to disqualify prosecution counsel from acting. See *R v MG* (2007) 69 NSWLR 20 and the discussion of this case in Part 5 of Chapter 4.

<sup>184</sup> *Ibid.*

<sup>185</sup> See Editorial, "The Counsel of Ahithophel," *The Age*, 28 February 1855, p 4.

<sup>186</sup> Mohony, J, *Eureka* (Melbourne, Melbourne University Press, 2001) p 185.

<sup>187</sup> *Ibid.*, 191.

<sup>188</sup> *Ibid.*, 185. See also Editorial, "The State Trials," *The Argus*, 28 February 1855, p 4 and Editorials, "Why the Trials are Postponed" and "'Tampering with the Jury'," *The Age*, 2 March 1855, p 4.

<sup>189</sup> See "The State Trials" reproduced in *The Age*, 18 March 1855, p 6.

<sup>190</sup> See *The Age*, 20 March 1855, p 4 & 5 and 21 March 1855 4 & 5 and *The Argus*, 20 March 1855, p 5 and 21 March 1855, p 5-6.

<sup>191</sup> *The Age*, 21 March 1855, p 4.

<sup>192</sup> *The Age*, 21 March 1855, p 5.

<sup>193</sup> *Ibid.* Despite Stawell's best efforts Hayes was acquitted.

[3.5.3.7] In the next trial, *R v Raffaello*,<sup>194</sup> the prosecution appeared at last to have a defendant who could be portrayed as the "foreign anarchist"<sup>195</sup> that fitted the official portrayal of the players in the Eureka Stockade.<sup>196</sup> Stawell urged the jury that, "Their verdict would declare that this man was one of a very few who tried to make the rest disaffected."<sup>197</sup> However, despite the apparent strength of the prosecution case<sup>198</sup> and by now familiar prosecutorial resolve to secure a conviction,<sup>199</sup> Stawell struggled to make any impression on the jury. Raffaello was also acquitted. Indeed, the Attorney-General's efforts continued to prove fruitless and all the remaining defendants were also acquitted.<sup>200</sup>

[3.5.3.8] It is apparent that Stawell allowed his indignation at what he perceived to be the treasonable activities of the Eureka Stockade defendants to cloud his professional judgment. His apparent partisan style and determination to secure a conviction owed far more to a desire to make an example of the defendants in a high profile case with clear political ramifications than to any desire to conform to the notion of the prosecutor as a restrained minister of justice.<sup>201</sup> Phillips concluded that Stawell "had only himself to blame" for his inability to persuade any of the juries to convict.<sup>202</sup> Stawell may well have been, as Phillips notes, "a fine man" and "normally of sound and reflective judgement."<sup>203</sup> However, it is clear that in the Eureka stockade trials Stawell "had allowed his emotions, fuelled by his indignation at the diggers' rebellious conduct to lead him into the decision to insist that charges be laid against all the prisoners for high treason, for which the penalty was death."<sup>204</sup> As Phillips observes, "This was in my view, a sledgehammer to crack a walnut, and the Melbourne juries clearly saw he was doing just that."<sup>205</sup>

#### Part 5(4): Aborigines

[3.5.4.1] Aboriginal defendants were also at risk of prosecutorial zeal. The apparent restraint with which prosecution counsel conducted cases such as *Bolden* and *Jamieson*

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<sup>194</sup> See *The Age*, 22 March 1855, p 4-5. See further Raffaello's own florid account, see Carboni, R, *The Eureka Stockade, 1855* (reprint) (Melbourne, Melbourne University Press, 1993).

<sup>195</sup> See the discussion of the trial in Editorial, "The Saddle on the Right Horse," *The Age*, 24 March 1855, p 4.

<sup>196</sup> *Ibid.*

<sup>197</sup> See *R v Raffaello*, *The Age*, 22 March 1855, p 5.

<sup>198</sup> Raffaello was not only present according to the Crown case but had been seen to brandish a pike during the fracas.

<sup>199</sup> See Editorial, above n 195.

<sup>200</sup> See *R v Vannick* (*The Age*, 23 March 1855, p 4-5), *R v Tumney & Beattie* (*The Age*, 24 March 1855, p 5) and *R v Read & Ors* (*The Age*, 27 March 1855, p 5 and 28 March 1855, p 4-5).

<sup>201</sup> Though Stawell denied any such motivation, see his closing comments in *R v Read*, *The Age*, 28 March 1855, p 5.

<sup>202</sup> Phillips, J, "Was Justice Really Done," Speech delivered at the University of Ballarat Democracy Conference, Ballarat, 25-27 November 2004, available online at: <http://www.abc.net.au/ballarat/stories/s1260652.htm>.

<sup>203</sup> *Ibid.* Stawell while a zealous prosecutor was later to serve as a distinguished Chief Justice of Victoria.

<sup>204</sup> Phillips (2004), above n 202.

<sup>205</sup> *Ibid.* This was a costly error on Stawell's part. It enabled the defence at trial, as Phillips notes, "To confess to the riot, and to laugh at the treason," see Phillips, J, "The Eureka Advocates: Part 1" (1990) 32 ALJ 211.

where the victims were Aborigines should be contrasted with the approach of prosecution counsel in a number of other cases where the defendants were Aborigines. In these cases prosecution counsel demonstrated a belligerence at odds with any role as a minister of justice. While it might be inappropriate in light of cases such as *Billy* to rely on these cases to argue that local prosecutors were inevitably biased against Aborigines in the discharge of their professional duties, a clear theme does emerge of Aborigines being labelled by prosecutors as “savages”<sup>206</sup> and “cannibals”<sup>207</sup> and as such deserving of prosecutorial zealotry. In these cases the prosecutor was to prove anything but a minister of justice. The approach of the Advocate-General of Western Australia as prosecution counsel in 1842 in *R v We-War*<sup>208</sup> is illustrative. The accused was charged with murder. The case had attracted considerable local interest as the accused was an Aborigine who had made local legal history in Western Australia by being the first Indigenous Australian tried under British criminal law “for offences committed against one of his own people.”<sup>209</sup> The Advocate-General resorted to an address that, even by the standards of the time,<sup>210</sup> was explicitly racist. He categorised the accused as belonging to a “savage rabble of wandering families” and implored the court not to be led astray by arguments of “cant.”<sup>211</sup> The Advocate-General argued:

The white man had at once boldly and manfully taken possession of the soil: and had at the same moment commenced the task of civilising the savage: a task which the settlers of Western Australia had accomplished to an extent, he was at once proud and sorry to say, unparalleled in the annals of the human race. There existed no law in reality among the natives, beyond that of force...A considerable amount of cant and nonsense had been talked in the mother-country upon allowing the natives distinct districts and hunting grounds. Our duty was to civilise the savage, and this could only be done by inducing them to frequent our residences, and by protecting him when in our society. The prisoner in the present case had gone beyond even the customs of the savages in barbarous treachery and cowardly bloodthirstiness...He believed that such base and bloodthirsty cowardice and treachery was inconsistent with the habits and laws of the savage; but, if otherwise, it was needless to say that the Government would ill perform its duty of carrying out the great task which the settlers had so gloriously commenced, if they did not immediately step forward, and, by a public prosecution and severe punishment, proclaim to the savage that such deeds were alike criminal in the eyes of the almighty, and intolerable in those of civilised nations.<sup>212</sup>

[3.5.4.2] Defence counsel objected to this diatribe and observed that the prosecutor’s exhortation to the court not to be distracted by “cant” was “an entreaty perfectly

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<sup>206</sup> See *R v We-War* [1842] NSWSupC 1 (*Inquirer*, 12 January 1842).

<sup>207</sup> See *R v Merrido & Nengavil* [1841] NSWSupC 48 (*Sydney Gazette*, 14 May 1841). This linking of cannibalism and Aborigines was not unique in nineteenth century British legal and popular thinking and featured also in the prosecution of cases such as *R v Jamieson* [1827] NSWSupC 31 (*Sydney Gazette*, 18 May 1827). See further Biber, K, “Cannibalism and Colonialism” (2005) 27 Syd L Rev 623.

<sup>208</sup> [1842] NSWSupC 1 (*Inquirer*, 12 January 1842).

<sup>209</sup> *Ibid.* The defence counsel mounted an unsuccessful challenge to the jurisdiction of the court to try the accused. This related chiefly to the issue of whether Western Australia was a settled or conquered colony.

<sup>210</sup> The prosecutor’s zealous approach in *We-War* should be contrasted with that shown in other early cases involving Indigenous accused, see above n 96.

<sup>211</sup> *Inquirer*, 12 January 1842.

<sup>212</sup> *Ibid.* See further “Murder by Natives,” *Perth Gazette and WA Journal*, 25 May 1839, p 3.

superfluous in this case.”<sup>213</sup> Defence counsel remarked that it was the first time in a court of law and justice that he had heard a prosecutor employ such an argument. Despite these comments the accused was convicted.<sup>214</sup>

[3.5.4.3] Even an Attorney-General such as John Plunkett who was known for the empathy that he demonstrated towards Aborigines<sup>215</sup> in cases such as *R v Kilmeister (No 2)*<sup>216</sup> was not immune from resorting to an approach that was at odds with any role as a minister of justice. In *R v Sandy and Others*<sup>217</sup> in 1839 the Indigenous defendants were charged with the robbery of a white man. Their meaningful participation in the proceedings was dubious as some of them apparently had little understanding of English. In opening the Crown case Plunkett declared that no observation calculated to prejudice the defendants would fall from him and he insisted that no distinction should be made between an Aboriginal defendant and a white defendant. But, as the issue at trial was one of identification Plunkett commented that an Aboriginal defendant, unlike a white defendant, was at a distinct advantage:

It was always difficult to identify the blacks from the great similarity of their features, but when they were identified as, in this case, they were satisfactorily, the law must take its course, and he hoped, if the prisoners were found guilty that their punishment would have a salutary effect upon the tribes of blacks and put a stop to the aggressions which were generally attributed to them.<sup>218</sup>

[3.5.4.4] Plunkett even opposed, in strenuous terms, the efforts of both the trial judge and defence counsel to secure the translation of the proceedings for the defendants.<sup>219</sup> He criticised these efforts as “spurious humanity”<sup>220</sup> and contended that as the defendants

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<sup>213</sup> *Ibid.*

<sup>214</sup> The sentence of death for the accused was commuted to transportation for life to Rottnest Island.

<sup>215</sup> Plunkett was known for his commitment to protecting Aborigines in New South Wales (see Woods, Ch 2, n 171, 140 and 140, n 7 and Plunkett's entry in the online edition of the Australian Dictionary of Biography available at: <http://www.adb.online.anu.edu.au/adbonline.htm>) and for his active support of “every measure tending to equalise the social conditions and to promote civil and religious liberty amidst the various, and often hostile, elements of this Colony” (*Sydney Herald* quoted at *Ibid.*). See further Molony, J, *John Hubert Plunkett: An Architect of Freedom in New South Wales, 1832-1869* (Canberra, Australian National University Press, 1973).

<sup>216</sup> [1838] NSWSupC 110 (*The Australian*, 1 December 1838 and *Sydney Gazette*, 1 December 1838).

<sup>217</sup> [1839] NSWSupC 61 (*Sydney Herald*, 19 August 1839 and *The Australian*, 17 August 1839).

<sup>218</sup> *The Australian*, 17 August 1839. These unsympathetic comments should be contrasted with Plunkett's approach in other cases concerning Aborigines, notably, though by no means solely, his determination in *Kilmeister* in the face of strong opposition to prosecute the white defendants charged with the murder of Aborigines. As Miles notes, Plunkett “fought the case with a commitment far beyond the call of duty” (Miles, Ch 2 n 326, 505) that “earned him the hatred of the colony's most powerful vested interests and excoriation by their principal mouthpiece” (*Ibid.*, 657). See also Therry, above n 22, 282. See further the evident fairness with which Plunkett undertook the prosecution of Indigenous defendants in such cases as *R v Dundumah* [1840] NSWSupC 82 (*Sydney Herald*, 10 Nov 1840) and *R v Billy* [1840] NSWSupC 78 (*Sydney Herald*, 5 November 1840) and his general commitment in this area, see further above n 215.

<sup>219</sup> Even to the point of insisting that the trial judge make a formal note of his objections.

<sup>220</sup> *Sydney Herald*, 19 August 1839. This description did not meet with the favour of the trial judge.

were legally represented there was no need for the evidence at trial to be translated for their benefit.<sup>221</sup>

[3.5.4.5] In some cases prosecutors might go even further and openly portray Aboriginal defendants as a threat to colonial society. This reflected the fear factor so prevalent in a frontier society where Aboriginal resistance to white settlement was a very real concern.<sup>222</sup> In *R v Tallboy*<sup>223</sup> in 1840 the defendant was charged with the murder of a white stockman who had been employed by the late Reverend Marsden, a prominent landowner. At trial the prosecutor, Mr. Therry, urged the jury to view the defendant as an enemy of white society and made clear the need, as he saw it, to make an example of the defendant by returning a guilty verdict:

...the present was only one of many outrages that had been committed on the whites by the aborigines in that distant part of the colony, and that it was necessary for the safety of society, that the aborigines should be made responsible to the laws for such improper acts of outrage as they were guilty of: it was a well known fact that not only the property of the settlers in the distant parts of the colony had been assailed by them, carried off [sic], and wantonly destroyed, but a number of whites had from time to time fallen victim to the savage fury of the blacks. It was only twelve months since, not less than seven white men had been tried for, convicted, and executed being concerned in an outrage on the blacks, and that too, in what in his opinion, was less direct evidence than that which he was about to offer<sup>224</sup>... he reminded the jury of their duty to themselves, and their fellow colonists, as it was for the purpose of protecting their lives and property, that they were called on to give their time and talents to the consideration of cases such as this...<sup>225</sup>

[3.5.4.6] The alleged threat posed to white society by conduct such as that attributed to Tallboy and the need to deter similar conduct by other Aborigines was repeated by the trial judge, Stephen J, in his comments in passing the death sentence.<sup>226</sup> A similar theme was echoed in 1841 in the prosecution of two Aboriginal defendants in *R v Merrido and Nengavil*.<sup>227</sup> The accused were charged with the murder of a white surveyor near Brisbane. They were also brandished as enemies of society. The prosecutor referred to

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<sup>221</sup> Plunkett justified this position by reference to the practice in his native Ireland where he asserted that a legally represented defendant who was unable to speak English did not have the proceedings translated for him or her.

<sup>222</sup> See further the references below at n 231.

<sup>223</sup> [1840] NSWSupC 44 (*Sydney Herald*, 12 August 1840).

<sup>224</sup> This is a reference to *R v Kilmeister (No 2)*, the Myall Creek case. The trial judge, Stephen J, with some understatement, cautioned the jury against being influenced by the prosecutor’s reference to that case.

<sup>225</sup> *Sydney Herald*, 12 August 1840. This diatribe was such that the prosecutor’s final reminder to the jury to weigh the whole of the evidence, both for and against the accused, was a meaningless incantation. Therry’s comments in *Tallboy* should be contrasted with his minister of justice approach in *R v Anderson & Ors* [1832] NSWSupC 8 (*Sydney Gazette*, 17 April 1832, see also above n 1) and *R v McIntyre* [1833] NSWSupC 86 (*Sydney Herald*, 15 August 1833, see above n 57-59).

<sup>226</sup> *Sydney Herald*, 14 August 1840. See also the commentary arising from *R v Tommy* [1827] NSWSupC 70 (*Monitor*, 26 November 1827) condemning the “failure” of the Attorney-General in prosecuting Aboriginal defendants for crimes upon whites and asserting the need to deter such crimes by “the Savage,” see *Monitor*, 29 November 1827.

<sup>227</sup> [1841] NSWSupC 48 (*Sydney Gazette*, 14 May 1841).

the “outrages” and “great atrocity” that the defendants had perpetrated.<sup>228</sup> He argued that no matter how distressing it might be for the jury to see “persons so inferior to them in intelligence” in court to answer for their crimes “it would be more distressing and more to be regretted, if they were not liable to the same punishment as the whites were.”<sup>229</sup> As late as 1861 one can still find counsel expressing this theme in the prosecution of Indigenous defendants.<sup>230</sup>

[3.5.4.7] The immoderation demonstrated by prosecution counsel in *Tallboy* and *Merrido* is not surprising in the context of colonial society at the time as the threat from Aborigines perceived by whites was very real. There was significant Aboriginal resistance to white settlement.<sup>231</sup> A contemporary observer in New South Wales noted that in respect of the 1830s, “The aggression of the aborigines along the whole border of civilisation grew worse and worse daily; and they involved generally the loss of life as well as property.”<sup>232</sup> A similar situation existed in Tasmania. Levy notes that by the 1820s the island’s Aboriginal population:

...no longer dismayed by their sanguinary white persecutors, roused their dormant natures; their atrocities...increased daily, and destruction was spread over the country; the traveller was waylaid and put to death; and the settler was speared on his own farm; and the most formidable kind of insidious warfare was in constant operation.<sup>233</sup>

#### Part 5(5): Other Offenders “Beyond the Pale”

[3.5.5.1] The undoubted passion with which prosecution counsel undertook the prosecution of defendants such as bushrangers, convicts, political offenders and Aborigines was not unusual in Australia. A range of other offences were regarded, sometimes bizarrely, as being “beyond the pale” and representing a real threat to colonial society and such offenders might well be prosecuted with a lack of restraint.<sup>234</sup> Sheep or

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<sup>228</sup> *Sydney Gazette*, 14 May 1841.

<sup>229</sup> *Ibid.*

<sup>230</sup> See the South Australian case of *R v Warretya & Ors* (*Advertiser*, 18 May 1861) where the Aboriginal defendants were accused of the brutal murder of a family of white settlers. The Solicitor-General at trial after initially appealing to the jury to discard any prejudice and to act only on the evidence described the crimes as “the most frightful outrage in the annals of the colony” (Liddy, P, *The Rainbird Murders 1861* (Norwood, Peacock Publications, 1993) p 62) and in his closing address highlighted the need for the jury in its verdict to have regard to the sense of security of white men and their families in the interior and to discourage white retribution, see further *Ibid.*, 65.

<sup>231</sup> See further Miles, Ch 2, n 326; Levy, M, *Governor George Arthur: A Colonial Benevolent Despot* (Georgian House, Melbourne, 1953) p 97-124; Harris, A, *Settlers and Convicts* (reprint) (Melbourne, Melbourne University Press, 1964) (Original, 1847) p 206-226; Reynolds, H, *The Other Side of the Frontier: An Interpretation of the Aboriginal Response to the Invasion and Settlement of Australia* (Townsville, James Cook University, 1981) and Reynolds, H, *Frontier: Aborigines, Settlers and Land* (Sydney, Allen & Unwin, 1987).

<sup>232</sup> Harris, above n 231, 212.

<sup>233</sup> Levy, above n 231, 103. See further “The Black Natives,” *Hobart Town Advertiser*, 18 November 1826; Hughes, n 8, 414-421 and Turnbull, C, *Black War: The Extermination of the Tasmanian Aborigines* (Melbourne, Cheshire, 1965).

<sup>234</sup> See the prosecutions in *R v Gelden & Davis* (*Hobart Town Gazette*, 18 June 1824) – the “vast and general mischief to a mercantile community” during a forgery trial of such offences; *R v Kellie* [1826] TASSupC 2 (*Colonial Times*, 31 March 1826) – prosecution counsel “exerted themselves most strenuously for a conviction” during the trial of a ship’s captain for shooting and wounding a sailor during an apparent mutiny; *R v Mossman &*

cattle thieves fell into this category.<sup>235</sup> Accordingly, the Attorney-General in *R v Butler and Others*<sup>236</sup> in 1824 urged the jury to make an example of several defendants accused of the theft of sheep, “for, if depredations of such an extent are not prevented, of if perpetrated, not visited with that punishment which the Law provides,<sup>237</sup> serious and alarming must be the evils to which every settler must be exposed.”<sup>238</sup> Offenders accused of a range of sexual offences such as rape, unlawful carnal knowledge of a child and even sodomy and bestiality were also viewed in these terms.<sup>239</sup> In *R v Matthews and Others*<sup>240</sup> in 1824 Gellibrand, in the very same year that he had acted with such conspicuous restraint in *Pearce*, adopted a most belligerent and emotive approach at trial in the prosecution of three defendants charged in relation to the rape of a ten year old girl. Gellibrand brandished the crime as one of “peculiar barbarity” and referred to the “defenceless form” of the “infant” who had been “defiled.”<sup>241</sup> He lamented that a female defendant to whose care the child had been entrusted, “O! degradation to her sex, had not [only] deserted her trust, but had actually pandered to the ravisher.”<sup>242</sup> The Attorney-General

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*Welsh* [1835] NSWSupC 1 (*Sydney Herald*, 5 February 1835) – the “great importance” in deterring the “serious evils” of convicts trying to escape from NSW; *R v Silvester* [1841] NSWSupC 15 (*Sydney Herald*, 8 February 1841) – the “imperative duty” of all involved in the administration of justice to curb the “brutal” sport of prize fights; *R v Peake & Ors* (*Sydney Herald*, 18 April 1842) – the “utmost importance” in not allowing insubordination on a whaling ship to go unpunished; *R v Chantry & Harris* (*Colonial Times*, 29 May 1846) – prosecution counsel urged the jury to mark their “reprehension” of the defendants who were accused of theft from their employer; and *R v Williams & Harper* (*Colonial Times*, 6 June 1848) – prosecution counsel made “every effort” to secure a conviction at the trial of a “bold robbery” of a jewellery store.”

<sup>235</sup> See the comments of Pedder CJ in *R v Clayton & Ors* (*Hobart Town Gazette*, 23 June 1827). See further Davis, above n 102, 25-27 and Castles, above n 18, 261.

<sup>236</sup> [1824] TASSupC 4 (*Hobart Town Gazette*, 2 July 1824. See also the similar prosecutorial approach adopted in *R v Foley & Pratt* (*Colonial Times*, 13 May, 1834) during the trial of two alleged cattle thieves.

<sup>237</sup> This offence carried the death penalty in Tasmania until 1836 and it was not uncommon for offenders to be hanged for this crime. See the report of the execution of the defendants in *R v Clayton & Ors* (*Colonial Times*, 6 July 1827). See further Davis, above n 102, 25-27.

<sup>238</sup> *Hobart Town Gazette*, 2 July 1824.

<sup>239</sup> See the robust prosecution in *R v Tougher & Kelly* (*Sydney Gazette*, 7 November 1839 and *Sydney Herald*, 8 November 1839) (assault with intent to “ravish” a female) and the sentencing comments of Dowling CJ in *R v Saunders*, *R v Hiefe* and *R v Manson* [1841] NSWSupC 14 (*Sydney Herald*, 16 February 1841). See also Davis, above n 102, 29-32 and Hughes, above n 8, 244-281. The rationale behind the view that sexual offenders should be the subject of stern prosecution and even execution was that in a society where women were so heavily outnumbered by men (Castles notes that in Tasmania in 1824 males outnumbered females by a factor of three to one and by 1847 this was still two to one, Castles, above n 18, 261) the colony’s women were endangered and had to be protected from the threat that any sexual offender posed to them, see Davis, above n 102, 29-32 and Castles, above n 18, 261-62. Such a rationale behind the prosecution of at least sodomy or bestiality seems very tenuous. As Castles notes, “In the twentieth century it may be difficult to comprehend the logic in arguments like this.” *Ibid*, 262.

<sup>240</sup> [1824] TASSupC 26 (*Hobart Town Gazette*, 3 December 1824).

<sup>241</sup> *Hobart Town Gazette*, 3 December 1824

<sup>242</sup> *Ibid*. The approach of prosecution counsel in *Matthews* can be contrasted with the “most feeling and pathetic manner” with which counsel prosecuted a female defendant in *R v Masters* [1835] TASSupC 9 (*Colonial Times*, 12 May 1835) and the restrained, even compassionate, manner in which counsel undertook the prosecution of a female defendant in *R v Birchall* (*The Age*, 24 July 1872, p 3). It may be significant that while the defendants in *Masters* and *Birchall* were charged with the murder of their infant children, a crime that even in the 1800s was regarded as unworthy of the full rigour of the criminal law (see the sympathetic report in the *Tasmanian & Austral-Asiatic Review* (23 April 1830) explaining why a mother might be driven to kill her new born child and condemning the death sentence carried out in *R v McLauchlan* [1830] TASSupC 14 (*Hobart Town Courier*, 17



went on to address the jury at "some length" as to the "heinous effects of such base crimes as imputed to the prisoners."<sup>243</sup>

[3.5.5.2] This theme also emerged in *R v Freeman*<sup>244</sup> in 1844. In this case the accused was a legally unrepresented black man<sup>245</sup> who was charged with keeping a "house of ill fame" in Hobart. Though this was only a misdemeanour and may not have represented an offence that challenged the foundations of colonial society, the Solicitor-General saw the case differently.<sup>246</sup> He called upon the members of the jury "as husbands and fathers of families to mark their detestation of the practices of the defendant" if the case should be made out as the crime of the accused "was one against both public and private morals and called loudly for a [guilty] verdict at their hands."<sup>247</sup> This indignation was shared by the trial judge and Freeman was convicted.<sup>248</sup>

[3.5.5.3] Such prosecutorial outbursts, overblown and excessive as they may appear, are not entirely surprising. In the fray of an adversarial contest combative instincts were<sup>249</sup> likely to prove, on occasion at least, difficult to resist. However, it is significant that many of the cases of the period in Australia that demonstrate prosecutorial fervour incompatible with the minister of justice role dealt with persons charged with offences that were seemingly regarded in colonial society as "beyond the pale." Such offenders didn't simply challenge accepted notions of law and order but were regarded as posing a threat to the colonial society. In these situations prosecution counsel does seem to have tended to ignore their role as the restrained minister of justice. Unlike the sympathy that was extended to "gentlemen," there was a tendency for the prosecutor to discard any convention of restraint and to seek, as was expressed by the prosecutors themselves in cases such as *Shea*, *Oxley* and *Tallboy*, to make an example for deterrent effect of defendants who were perceived as "enemies of society." Prosecutors were selective in who was, or was not, to be regarded as an "enemy of society." While a defendant such as Major Lord standing accused of plundering government stores, or the Magistrate in *Bingle and Were* accused of cattle stealing were treated with prosecutorial benevolence, in contrast the sheep thief in *Butler* or the convict defendants in *Oxley* and *Shea* were

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April 1830; see also Davis, n 85, 20 and 25) on a mother convicted of the murder of her infant child), the crime of the female defendant in *Matthews* could not be regarded in such a light. Perhaps one crime was treated as conforming to acceptable notions of female criminality and one was not. See further Summers, A, *Damned Whores and God's Police* (Ringwood, Penguin, 1975).

<sup>243</sup> *Ibid.* Though to no avail as the defendants were acquitted.

<sup>244</sup> *Colonial Times*, 5 March 1844.

<sup>245</sup> Not an Aborigine it would appear from the report of the trial in the *Colonial Times*.

<sup>246</sup> Above n 244. A police witness described the premises in these terms, "It was a brothel, and one of the lowest of the low." The prosecution witnesses described that sailors congregated at the premises and that dancing took place and, perhaps more worryingly, girls as young as 13 joined in such festivities and loitered at the premises.

<sup>247</sup> Above n 244.

<sup>248</sup> Above n 244: Hone J with "considerable warmth" and a notable lack of impartiality in his summing up expressed his abhorrence of the activities of the accused and called upon the jury for a guilty verdict. In sentencing Freeman to a term of imprisonment the judge categorised the offence as of the "worst description" and as "one which was calculated to entail the most mischievous evils upon society."

<sup>249</sup> And, indeed, still are if modern cases such as *R v Livermore* (2006) 67 NSWLR 659 and *R v MG* (2007) 69 NSWLR 20 are anything to go by. See further the discussion in Part 5 of Chapter 4.

denounced by the prosecutors in the strongest terms and the jury urged to make an example of them. A considerable degree of prejudice and class bias is manifest in the reasoning by which the prosecuting lawyers in Australia determined which defendants were to be deemed as deserving of prosecutorial zeal on the basis that they were an “enemy of society” and those who were not. There was a selective adherence by prosecuting lawyers to their professed role of a minister of justice. I would suggest that criticism of Australian prosecutors in the nineteenth century as being at times<sup>250</sup> both overly partisan and unduly influenced by subjective considerations like class and race and the perceived need to make an “example” of certain offenders would be entirely justified.

## **Part 6: The Ultimate Triumph in Australia of the Prosecutor as a Minister of Justice**

[3.6.1] It was by no means always the case that prosecution counsel acted in a partial and/or combative manner. The prosecutorial restraint and solicitude for the accused demonstrated in such cases as *Anderson and Davis* and *Davidson* (discussed in Part 3) continued to be demonstrated, although unevenly, throughout the nineteenth century. As has been seen even in cases that might attract strong opprobrium such as horrific murder and cannibalism,<sup>251</sup> the commission of an “unnatural act” with an animal,<sup>252</sup> mutiny by sailors on a convict ship,<sup>253</sup> piracy by convicts in seizing a ship during an escape attempt,<sup>254</sup> the murder of a police constable<sup>255</sup> and robbery by notorious bushrangers,<sup>256</sup> prosecution counsel resisted adversarial temptation and conducted their cases with scrupulous restraint. Such defendants were, obviously, not respectable “gentlemen.” Their crimes were likely to have been regarded in “respectable” colonial society as posing a challenge to the accepted notions of law and order, but this did not prevent prosecution counsel from acting with fairness. As the nineteenth century progressed prosecutorial practice in Australia came to accord with what appears to have been the “norm” in England, where from at least the 1790s one finds prosecution counsel in confronting defendants whose crimes challenged the established social order or were otherwise “beyond the pale,” acting with moderation and restraint.<sup>257</sup> One finds prosecution counsel in Australia increasingly throughout the 1800s, even in cases giving rise to strong passions, conducting their case with restraint and fairness. Even in cases that were seemingly “beyond the pale,” the prosecutor acted as a minister of justice. The application

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<sup>250</sup> As will be discussed further, it is important to note that on other occasions, even if dealing with such potentially emotive cases as bushranging, piracy or mutiny the Australian prosecutor might still act with notable restraint.

<sup>251</sup> See *R v Pearce* [1824] TASSupC 11 (*Hobart Town Gazette*, 25 June and 6 August 1824). See also above n 90.

<sup>252</sup> See *R v Wells* [1833] TASSupC 3 (*Tasmanian*, 22 March 1833). See also above n 58.

<sup>253</sup> See *R v Anderson & Davies* [1838] NSWSupC 8 (*Sydney Gazette* 17 April 1832). See also above n 58.

<sup>254</sup> See *R v Cam & Denner* [1832] TASSupC 19 (*Tasmanian*, 7 April 1832). See also above n 58.

<sup>255</sup> *R v Neale*, *Sydney Herald*, 12 January 1842. See also above n 58.

<sup>256</sup> See *R v McCabe* [1825] TASSupC 17 (*Colonial Times*, 4 November 1825) and *R v Regan & Ors* [1838] TASSupC 12 (*Hobart Town Gazette*, 15 June 1838). See also above n 58.

<sup>257</sup> See the minister of justice approach demonstrated in the English cases cited at Chapter 2 n 104 and n 106.

of the ideal at this time remained patchy, but, nevertheless, after an inconsistent development and application, an unchallenged notion of the prosecutor in Australia as a minister of justice was to emerge. The comment in 1864 of the Attorney-General of New South Wales during the trial of the bushranger Francis Gardiner, "No-one would be better pleased than myself if you acquit the prisoner,"<sup>258</sup> illustrates the ultimate confirmation in Australia of the prosecutor as a minister of justice. This coincided with the evolution of Australian society during the mid 1800s from a penal colony beset with threats to an increasingly secure and stable civil society.

[3.6.2] A striking example of prosecutorial restraint was demonstrated in Tasmania in 1843 in *R v Cash and Kavanagh*<sup>259</sup> during the trial for murder of two notorious bushrangers. The Attorney-General acted with moderation in the proceedings. He urged the jury "for the sake of the prisoner at the bar, and on every principle of right and justice" to listen only to the evidence and to divest their minds of any preconceived opinion or anything they may have read in the Colony's newspapers or heard from any other medium.<sup>260</sup> A similar concern for the defendant had been demonstrated by the same Attorney-General a year before in *R v Belfield*.<sup>261</sup> In that case the legally unrepresented defendant was charged with the murder of a fellow convict at Port Arthur. In opening the case, the Attorney-General explained that he would depart from his usual practice of not offering any observation upon the prosecution case but that this was not in order to seek a guilty verdict but rather to emphasise to the jury the importance of ignoring anything they might have heard or read about the case and to act only upon the evidence that was led at trial. The Attorney-General commented that he had seen a detailed report of the case in the local press and that he would be failing in his duty as a public prosecutor if he did not deplore such accounts as they undermined the "well known maxim in British jurisprudence that every man must be believed to be innocent till he was proved to be guilty."<sup>262</sup>

[3.6.3] It seems that from about this period, namely the 1840s, such prosecutorial solicitude for the interests of the accused and the importance of securing a fair trial became a regular feature of legal practice in Australia. The case of *R v Knatchbull*<sup>263</sup> in 1844 illustrates this trend. Knatchbull was an unlikely defendant. He came from a "respectable" background<sup>264</sup> and his brother, Sir Edward Knatchbull, was a Minister at

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<sup>258</sup> White, C, *History of Australian Bushrangers (Vol 1)* (Hawthorn, Lloyd O'Neill, 1970) p 310.

<sup>259</sup> *Hobart Town Advertiser*, 8 September 1843. See also *Colonial Times*, 12 September 1843. For Cash's own erudite account of his life, see Cash, M, *The Bushranger of Van Diemen's Land in 1843-4 (5<sup>th</sup> ed)* (Hobart, J Walch & Sons, 1929).

<sup>260</sup> *Hobart Town Advertiser*, 8 September 1843.

<sup>261</sup> *Colonial Times*, 25 January 1842.

<sup>262</sup> *Ibid.*

<sup>263</sup> See the reports of the trial in *Sydney Morning Herald*, 25 January 1844, the *Sydney Morning Chronicle*, 27 January 1844 and *The Australian*, 25 January 1844. See further Roderick C, *John Knatchbull: From Quarterdeck to Gallows* (Sydney, Angus and Robertson, 1963).

<sup>264</sup> Knatchbull was the son of a Baronet and had served as a naval officer in the Napoleonic Wars.

the time in the British Cabinet. However, Knatchbull had been a notorious convict<sup>265</sup> and “in the colony his career was one of low vice and habitual crime.”<sup>266</sup> Nevertheless, he seems to have enjoyed a “charmed life” in the colonies after his transportation from England.<sup>267</sup> Knatchbull was charged with the brutal murder of a woman in Sydney and there was a strong public reaction. As Woods notes:

The resentment felt by the mass of New South Welshmen against their lords and masters in the British caste system was usually stifled or diverted; however, in Knatchbull, the man in the street had a living symbol of the arrogance of the ruling classes. He was a ‘toff’ who had treated a working class woman with the ultimate contempt and disregard.<sup>268</sup>

[3.6.4] Notwithstanding this public passion it is instructive that at trial the Attorney-General acted with scrupulous restraint. He declared that the “notoriety”<sup>269</sup> of the accused was irrelevant and urged the jury to dismiss from their minds anything they may have heard outside of court relating to either the case or the accused. He reminded them that they should act only on the evidence that they would hear as “by which evidence alone the case must stand or fall.”<sup>270</sup> The Attorney-General noted that if he was unable to prove what he claimed was the prosecution case by the evidence of his witnesses then “he would beg of them to let all he had stated, and all they had heard, go for nothing.”<sup>271</sup> It is unclear whether the Attorney’s fair treatment of Knatchbull was the product of partiality and bias in favour of an accused from a “respectable” background, masquerading as prosecutorial restraint similar to that shown in earlier cases such as *Lord* and *Wright* or rather was genuine adherence on the Attorney’s part to the notion of the prosecutor as the restrained minister of justice.<sup>272</sup>

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<sup>265</sup> Knatchbull had committed further crimes in the colony that had led him to being transported to Norfolk Island. See the hostile descriptions of him in Therry, above n 22, 100-103 and Editorial, “Shocking Attempt at Murder,” *Colonial Times*, 6 February 1844, p 3.

<sup>266</sup> Therry, above n 22, 100.

<sup>267</sup> Knatchbull had been implicated not only in a plot to poison the crew of the ship taking him to Norfolk Island but also in a planned mutiny at Norfolk Island in early 1834 (this was the mutiny that gave rise to *R v Douglas & Ors* discussed earlier in this Chapter, see above n 152) when he acted as an informer and provided a deposition to the island’s Commandant. Knatchbull, much to the regret of Burton J (the trial judge in *Douglas*) was not charged, see Therry, above n 22, 101. It is unsurprising that the editor in the *Colonial Times* in 1844 speculated that “but for the powerful interests of his English relatives...he [Knatchbull] would have been hung in chains years ago.” See Editorial, n 265. See further Roderick, above n 263.

<sup>268</sup> Woods, Ch 2, n 171, 159-160.

<sup>269</sup> *Sydney Morning Herald*, 25 January 1844.

<sup>270</sup> *Ibid.*

<sup>271</sup> *Sydney Morning Chronicle*, 27 January 1844. Notwithstanding a spirited defence of insanity based on “irresistible impulse” Knatchbull was convicted by the jury who did not trouble to leave their box.

<sup>272</sup> It must be remembered as Hay asserts (see Hay, Ch 2, n 29, 33-34 and 39) that the prosecution of a “toff” served an important purpose in the British criminal justice system. It served to illustrate, if only in theory, that there was genuine equality before the law and “the impression made by the execution of a man of property or position was very deep.” If an ostensibly respectable defendant such as Lord Ferrers (an English aristocrat who, wearing his silver brocade wedding-suit, was famously hanged and dissected for the murder of his steward) or Knatchbull could be prosecuted and hanged in a “society radically divided between the rich and the poor, the powerful and the powerless” then the rhetoric of the law was not hollow. See also *R v Ross* (*Colonial Times*, 15 March 1842) where during the trial of a former Solicitor-General for embezzlement the Attorney-General drew

[3.6.5] However, the cases of *R v Nixon*<sup>273</sup> in 1857 and *R v Griffiths*<sup>274</sup> in 1865 in Tasmania afford clear illustrations of the prosecutor's adherence to the role of a minister of justice regardless of the status of the defendant or victim. In *Nixon* the accused was a former convict<sup>275</sup> who was charged with the brutal murder of the 14 year old son of a Captain Chamberlayne. The boy had also been sexually assaulted. The case had attracted strong public passion and calls in the press for summary justice.<sup>276</sup> The Attorney-General's restrained conduct of the trial attracted the praise of both defence counsel and the trial judge.<sup>277</sup> Notwithstanding the "diabolical" circumstances of the crime, the Attorney emphasised in his opening address that the administration of justice should be "mild and passionless."<sup>278</sup> He reminded the jury that they were no longer ordinary members of the public but were "sacred judges of the prisoner at the bar"<sup>279</sup> and it was crucial that they should keep their minds free of any prejudice and act only on the evidence as presented at trial. The Attorney stated that he would be amiss in his duty if he didn't "openly and emphatically condemn" some of the stronger press coverage that had been "so subversive of every principle of justice" and that if such views became prevalent no man would ever have a fair trial and things would be worse than had existed in California under the Vigilance Committee.<sup>280</sup> *Nixon* is a pivotal case in illustrating the development of the prosecutorial role in Australia. The accused conformed on any definition to the notion in colonial Australia of an "enemy of society." Yet the Attorney's scrupulously fair conduct of the highly charged proceedings highlights the application in Australia of the prosecutorial role as a minister of justice in reality as well as rhetoric.

[3.6.6] A similar situation arose in *Griffiths*. The accused in this case had also attracted strong opprobrium after being charged with the murder of two young children. The police had been forced to protect Griffiths from the summary vengeance of an enraged mob before taking him before the Magistrate. At trial the Attorney-General noted the terrible nature of the alleged crime but emphasised that it was incumbent upon the jury to approach the case in the same careful manner that he had and to ensure that they put

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attention to the "high sphere" in which the accused had previously moved but emphasised that it was important to "show the public that there was not in this colony at least one law for the rich, and another for the poor." See further the prosecution of "gentlemen" in *R v Bogle* [1842] TASSupC 32 (*True Colonist*, 16 December 1842); *R v Thompson* (*Sydney Morning Herald*, 17 January 1844); *R v Hawdon* (*Sydney Morning Herald*, 11 January 1845); *R v Nicholas* (*Mercury*, 9 July 1870); and *R v Lund* (*Sydney Morning Herald*, 8 November 1883, p 3).

<sup>273</sup> *Colonial Times*, 7 February 1857, p 2-3 and *Hobart Town Mercury*, 6 February, p 2-3 and 9 February 1857, p 3. See also Davis, above n 102, 60-61 for an account of the case.

<sup>274</sup> *Hobart Mercury*, 25 and 26 October 1865. See also Davis, above n 102, 65.

<sup>275</sup> Flemming CJ noted that Nixon had been transported to Tasmania for manslaughter in 1841 and had then been guilty of a "continued series of offences" including of an "unnatural" nature, see *Colonial Times*, 7 February 1857, p 3.

<sup>276</sup> Defence counsel noted that the accused had been at high risk of being "literally torn piece to piece" prior to any trial, see *Colonial Times*, 7 February 1857, p 3 and *Mercury*, 9 February 1857, p 3.

<sup>277</sup> It also attracted the praise of the Press, see Editorial, "Nixon's Trial," *Hobart Town Mercury*, 9 February 1857, p 2.

<sup>278</sup> *Ibid.*, 2.

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.* This is a reference to the vigilante style justice and "kangaroo courts" of California after the 1849 Gold Rush.

from their minds any preconception or prejudice. It was necessary for them to act only on the evidence before them and to examine “carefully and minutely” both the prosecution witnesses and their evidence “so that they might be able to look carefully for such points as might be in favour of the unhappy prisoner in order that they came to a correct decision.”<sup>281</sup> The trial judge, Flemming CJ commended the prosecutor’s exhortation: “He trusted most seriously that they would ponder over the very judicious remarks of the learned Attorney-General, in reference to any preconceptions which they might have of the case.”<sup>282</sup>

[3.6.7] Even in the most highly charged case prosecution counsel can be found acting as would befit a minister of justice. A telling illustration is to be found in the trial of *R v O’Farrell*<sup>283</sup> in 1868. O’Farrell had shot and wounded Prince Alfred, a son of Queen Victoria, during an apparent assassination attempt. The case prompted outpourings of outrage and patriotism throughout Australia. There were ominous suggestions that O’Farrell was part of a sinister plot by Irish Fenian terrorists resident in Australia.<sup>284</sup> Despite this emotive background James Martin, the Attorney-General and Premier, declared prior to trial that it was important that justice was accorded to the accused.<sup>285</sup> This sentiment was repeated at trial. Martin insisted that the jury must deal with O’Farrell “in the same impartial manner as that they would show in regard to any other case brought before them”<sup>286</sup> and accord no prejudice on account of the victim’s royal position. Martin declared that it was vital that the jury not approach the case in a “spirit of vengeance and partiality” but in a spirit of “calm, cool and dispassionate inquiry” so that “the British Empire and the world might have an example not of our vengeance but of our justice.”<sup>287</sup> Martin “carefully abstained from bringing before the jury any consideration with connection with a secret or Fenian organisation”<sup>288</sup> and confined the

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<sup>281</sup> *Hobart Mercury*, 25 October 1865.

<sup>282</sup> *Hobart Mercury*, 26 October 1865. The accused was, quite astonishingly in such a case, unrepresented. He protested his innocence but called no witnesses. He was found guilty on compelling evidence and hanged.

<sup>283</sup> See *The Age*, 6 April 1868, p 6 and *The Mercury*, 7 April, 1868, p 3, for a report of the trial.

<sup>284</sup> See *The Age*, 14 March 1868, p 4, 5 and 6 and Woods, Ch 2, n 171, 242-243. Ironically, O’Farrell himself did nothing to dispel these accounts and even claimed that he was part of a wider plot, see *The Age*, 17 March 1868, p 4 and the report of the committal hearing, *The Age*, 23 March 1868, p 6. Despite fears of a wider Irish Fenian plot it seems clear that O’Farrell was mentally disordered and acted alone, see *The Age*, 16 March 1868, p 6; Amos, K, *The Fenians in Australia: 1865-1880* (NSW University Press, Sydney, 1988) p 76; Woods, Ch 2, n 171, 240-243 and Martin, A, *Henry Parkes: A Biography* (Melbourne, Melbourne University Press, 1980) p 236-238. However, fear that O’Farrell was part of a wider Fenian plot was exploited by local politicians, notably the Colonial Secretary, Henry Parkes, and the New South Wales legislature in a single day rushed through the *Treason-Felony Act 1868* which included the almost farcical offence of failing to toast the Queen in a loyal toast, see Amos, above n 284, 56-71 and Woods, Ch 2, n 171, 242-243.

<sup>285</sup> *The Age*, 1 April 1868, p 5.

<sup>286</sup> *Illustrated Sydney News*, 20 April 1868 quoted by Woods, Ch 2, n 171, 237.

<sup>287</sup> Travers (1986), Ch 2, n 57, 86.

<sup>288</sup> Martin, above n 284, 238.

prosecution case to the issue of insanity.<sup>289</sup> The prosecutor, was outwardly at least, the model of detached restraint in his conduct of the case.<sup>290</sup>

[3.6.8] A similar moderation was demonstrated by the Solicitor-General of South Australia during his closing address as prosecution counsel in 1873 during the trial of Elizabeth Woolcock for the murder of her husband.<sup>291</sup> He emphasised to the jury that his role had not been to press the case against the accused unfairly but merely to place the evidence fairly before them in the interests of justice.<sup>292</sup>

[3.6.9] Such restraint continued to be displayed by prosecution counsel into the 20th century in other similar highly charged cases. In 1900, for instance, in *R v Governor*<sup>293</sup> the accused was an Aborigine charged with the murder of a white woman after an apparent racial slight.<sup>294</sup> He had apparently committed a string of other murders. The case had been highly publicised and had aroused strong local passions. Defence counsel complained in his closing address of the sensational reports that had left the public's ears ringing with the popular clamour for blood and revenge.<sup>295</sup> The prosecutor in his opening address warned the jury not to be inflamed by what they had heard or read of the case.

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<sup>289</sup> *The Age*, 6 April 1868, p 6.

<sup>290</sup> See Travers, Ch 2, n 57, 79 and 85-86. However, the prosecution, or at least the Colonial Secretary, Henry Parkes, can be strongly criticised for their concealment, from both the defence and the jury, of the contents, and even the existence, of O'Farrell's personal journal that was so bizarre and irrational that it was clearly relevant and beneficial to the defence of insanity, see Travers, Ch 2, n 57, 44 and 139-141 and Woods, Ch 2, n 171, 240-243. This action was at odds with any notion of the prosecutor's role as a minister of justice but it was not until such modern decisions as *R v Mallard* (2005) 224 CLR 125 that the minister of justice role was to find practical expression in the prosecution's wide duty of disclosure to the defence of such significant unused material in its possession as the diary. See the discussion of the general issue of disclosure in the 1800s in Part 2 of Chapter 5 and specifically of O'Farrell in Part 3 of Chapter 5.

<sup>291</sup> See Peters, A, *No Monument of Stone: Elizabeth Woolcock's Struggle through Life* (Adelaide, A Peters, 1992).

<sup>292</sup> *Ibid*, 143. See also the minister of justice approach adopted by prosecution counsel in *R v Hill & McKay* [1841] TASSupC 18 (*The Courier*, 27 April 1841) (murder); *R v Parrot* (*Colonial Times*, 7 September 1841) (alleged theft from employer); *R v Vidall* (*Sydney Morning Herald*, 13 January 1845) (alleged murder by a Frenchman); *R v Kenney* (*The Courier*, 6 March 1847) (burglary and attempted murder); *R v Gerard* (*Murray's Review*, 28 July 1843 and *Hobart Town Courier*, 21 July 1843) (alleged manslaughter following provocation); *R v Keelor* (*Colonial Times*, 29 October 1847) (attempted murder by a police constable); *R v Bryan* (*Maitland Mercury*, 20 September 1848) (the Attorney-General "most dispassionately conducted" the trial for murder of a legally unrepresented accused); *R v Day & Campbell* (*Colonial Times*, 17 May 1850) (assault with intent to injure health through forcing the victim to swallow an ounce of tobacco); *R v Sim Lac* (*Sydney Morning Herald*, 6 April 1853, p 2) (during the trial of a Chinese man for an "unnatural offence" upon a boy the prosecutor urged the jury to put aside any prejudices arising from either the nature of the crime or the background of the accused); *R v Cox* (*Colonial Times*, 2 June 1854) (alleged murder); *R v Hanslowe* (*Mercury*, 26 January 1859) (murder); *R v Beckett* (*Mercury*, 29 January 1859) (alleged murder by a mother of her new born child); *R v Birchall*, (*The Age*, 24 July 1873, p 4) (alleged murder of a new born child by the mother); *R v Peters* (*Mercury*, 1 and 2 December 1875) (prosecution counsel during a trial for fraudulent trading acted with notable restraint despite unjustified strong and personal attacks upon him by defence counsel); *R v Deeming* in 1892 (see O'Sullivan, J, *A Most Unique Ruffian: The Trial of FB Deeming, Melbourne, 1892* (Melbourne, FW Cheshire, 1968) (prosecution counsel opened the trial of a notorious murderer "briefly and without any note of passion" at 193; and *R v Dean* in April 1895 (see the account of the trial in Blackwell, L, *Death Cell at Darlinghurst* (Melbourne, Hutchinson Publishing 1970) p 11-12) (attempted murder by a husband of his wife).

<sup>293</sup> *The Age*, 23 and 24 November 1900.

<sup>294</sup> This case inspired the well known film, *The Chant of Jimmy Blacksmith*.

<sup>295</sup> See the closing address of defence counsel, reported in *The Age*, 24 November 1900.

He emphasised that the jury should come to the case with a “clean slate” and not give a verdict against the weight of the evidence.<sup>296</sup> He confined the remainder of his address to an objective and understated narration of the circumstances.

[3.6.10] A similar solicitude for the accused was displayed by prosecution counsel in 1914 in the Tasmanian case of *R v Belbin*<sup>297</sup> at the trial of a man accused of murdering a woman he had apparently been intent upon raping. The prosecuting counsel confined his opening address to an understated and dispassionate narration of the facts the Crown intended to lead at trial. In closing, he remarked on the “painful duty” he had to perform and reminded the jury to act only upon the evidence that they had heard.<sup>298</sup> His parting comments were to advise the jury that:

It was not only their duty to acquit [the] accused if they did not consider the evidence sufficiently strong, but a right which was due to the prisoner. They had a duty to discharge in the interests of justice, and he hoped the Great Maker of them all would enable them to arrive at a just verdict.<sup>299</sup>

[3.6.11] This case confirms the by now established practice of the prosecutor as the disinterested figure purely concerned with seeking of the truth, a minister of justice. The role of the partisan or zealous advocate evident during the trials discussed in Part 5 was plainly not to remain the ultimate representation of the Australian prosecutor’s role.

## **Part 7: Why the Minister of Justice Role Emerged in Practice in Australia and its Implications**

[3.7.1] As in England, as discussed in the last Chapter, the change in the practical nature of the prosecutorial role in Australia did not occur in a social vacuum.<sup>300</sup> It is noteworthy that Australia underwent a fundamental transformation during the course of the middle part of the nineteenth century and evolved far beyond its origins as a simple penal colony. Though a detailed consideration of these changes and the reasons for them is beyond the scope of this Thesis it is notable that transportation to New South Wales ended in 1840 and to Tasmania in 1853. The colonies were granted first representative and then responsible government by 1856. There was increasing “free” migration to Australia in the 1830s and 1840s and a vast influx during the Gold Rushes of the 1850s. The number of crimes attracting the death penalty was drastically reduced.

[3.7.2] Tasmania and New South Wales were no longer isolated penal outposts in which the non-convict white population felt themselves under constant threat, whether from bushrangers, convicts or Aborigines. The fear factor in colonial society subsided. There

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<sup>296</sup> *The Age*, 23 November 1900.

<sup>297</sup> *Mercury*, 14 and 17 February 1914. See also Davis, above n 102, 84-88.

<sup>298</sup> *Mercury*, 17 February 1914, p 2.

<sup>299</sup> *Ibid.*

<sup>300</sup> Similarly, as discussed in Chapter 2 the original development of the prosecutorial role as a minister of justice in England in the early 1800s is explicable by the particular social and historical climate in which it emerged.



was an emergence and establishment of democratic political institutions<sup>301</sup> and the development of an "agreeable and satisfactory"<sup>302</sup> civil society such as might accord with that of any of the principal towns of England outside of London.<sup>303</sup> By 1850, as Shaw has noted, "convictism was virtually at an end, prosperous communities, largely self-governing, were winning wealth from the former wilderness, and the cultural and social foundations of a nation had been laid."<sup>304</sup> Neal has described how with the granting of responsible government in New South Wales in 1856 the transition from penal colony to free society was complete.<sup>305</sup> Shaw describes how the Gold Rushes of the 1850s had a further major effect on Australian society that was not confined to Victoria.<sup>306</sup> By 1860, he concludes, quoting a contemporary observer, that a "vast continent, long regarded only as a convict prison and an abode of one of the lowest forms of savage life" had been elevated to "become a seat of industry, progressive refinement, freedom and Christianity."<sup>307</sup> Even in Tasmania where the legacy of transportation proved more lasting than that experienced on the mainland<sup>308</sup> and the "fear" factor survived beyond the 1850s,<sup>309</sup> a "clean break with the past"<sup>310</sup> was achieved with the end of transportation in 1853, the granting of responsible government in 1856 and even the formal renaming of the colony in 1855 as "Tasmania."<sup>311</sup> After 1865 the fear factor, even in Tasmania, dissipated.<sup>312</sup> In contrast to the threatening image of Tasmania described by Montagu J half a century earlier, "Historians are agreed that by the end of the 19<sup>th</sup> century Tasmania had become most law abiding."<sup>313</sup> As the rule of law took hold in Australia in the context of an increasingly developed and stable society,<sup>314</sup> it is clear that the English concept of the appropriate prosecutorial role in a fair criminal process also gained widespread acceptance.

[3.7.3] It is significant that criminal practice and procedure in the nineteenth century in the various Australian jurisdictions did not always accord with that of England. Indeed,

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<sup>301</sup> See further Neal, above n 102; Hirst (1988), above n 142 and Finn, B, *Law and Government in Colonial Australia* (Melbourne, Oxford University Press, 1987).

<sup>302</sup> Therry, above n 22, 60.

<sup>303</sup> *Ibid*, 59-66.

<sup>304</sup> Shaw, A, *The Story of Australia* (London, Faber & Faber, 1960) p 104.

<sup>305</sup> Neal, above n 102, 197.

<sup>306</sup> Serle (1963), above n 161, 369-381.

<sup>307</sup> *Ibid*, 379. See also Therry, above n 22, 407.

<sup>308</sup> Hughes, above n 8, 589-594. See further Boyce, above n 140.

<sup>309</sup> Davis attributes these continued fears to an over-reaction to the arrival of convicts from Norfolk Island, see Davis, above n 102, 58.

<sup>310</sup> Robson, above n 139, 521.

<sup>311</sup> *Ibid*, 521 and 528-529. See further *Ibid*, 483-512 (transportation) and 513-534 (self-government). Though Robson does note that the "wild and bloody" (*Ibid*, 521) Tasmania of old still lingered. On the day that news reached London in 1855 of the renaming of Tasmania, four convicts were publicly hanged in Hobart (*Ibid*, 521-522). See also Boyce, above n 140, 236-243.

<sup>312</sup> Davis, above n 102, 58-67.

<sup>313</sup> *Ibid*, 71.

<sup>314</sup> See further Neal, above n 102.

there were major disparities in certain areas.<sup>315</sup> The comments of Dowling J in *Farrell* and Kidston might have suggested that it was possible that, notwithstanding the adoption in Australia of the law of England, a different approach to the role of the prosecutor might have evolved in Australia given the peculiar local conditions. However any such divergence in criminal practice between England and Australia did not extend to an issue as fundamental in the criminal process as the proper role of the prosecution lawyer. It would seem that the view that the prosecutor should act as a minister of justice and not as a partisan advocate became a central pillar of English criminal procedure in the 1800s.<sup>316</sup> Though on rare occasions in practice, even in England, an unusually partisan prosecutor might depart from this role,<sup>317</sup> it is notable that such cases were very much an aberration. Various English cases in the 1800s and beyond confirmed in resounding terms that the proper prosecutorial role remained that of a minister of justice.<sup>318</sup>

[3.7.4] In dealing with such a crucial issue to the administration of criminal justice as the prosecutorial role, and given the clear and authoritative judicial pronouncements in England declaring that role was as a minister of justice (and the sound reasons for the adoption of such a role given the unequal position of the defendant within the English criminal process of the nineteenth century), it was highly unlikely that a different position would ultimately be taken in Australia. The judicial and legal culture of Australia in the nineteenth century, if not well into the second half of the 20<sup>th</sup> century, was so deferential, if not subordinate, to the law of England<sup>319</sup> that it was to be expected that despite local conditions and the adversarial nature of nineteenth century Australian criminal process, the same prosecutorial path would be taken in Australia. As Kercher notes, “The dominant belief by the second half of the nineteenth century was that there was one, universal timeless common law and that colonial conditions would rarely justify its non-acceptance.”<sup>320</sup> It is clear that, despite the absence in Australia in the nineteenth century of an authoritative judicial pronouncement similar to *Berens* or *Puddick*, the eventual practice and understanding as to the proper role of the prosecuting lawyer in Australia was eventually to become that expressed in the English cases and as had been foreshadowed by the prosecutors themselves in Australian cases such as *Davidson* and *Anderson and Davies*. Clearly, on occasion, prosecutors in Australia did depart from the role of the impartial minister of justice. In cases such as *Lord*, *Wright* and *Bingle and Wear* prosecution counsel showed explicit class bias in favour of “respectable” defendants under the guise of prosecutorial restraint. In the trials described above in Part 5, such as

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<sup>315</sup> The private prosecutor, see above n 27, and the grand jury, see above n 28, were never as prominent in Australia as in England.

<sup>316</sup> Rogers, Ch 1, n 170, 259-260.

<sup>317</sup> See, for example, *R v Vaughan*, *The Times* 14 August, 1828. See also the cases noted at n 110, n 271 and n 282 in Chapter 2.

<sup>318</sup> See *R v Berens* (1865) 4 F & F 842, *R v Puddick* (1865) 4 F & F 497, *R v Holchester* (1865) 10 Cox CC 227, *R v Banks* [1916] 2 KB 621, *R v House* (1921) 16 Cr App R 49 and *R v Sugarman* (1935) 25 Cr App R 109.

<sup>319</sup> The High Court considered that it was bound by decisions of the House of Lords until 1963 (see *R v Parker* (1963) 37 ALJR 1) and by decisions of the Privy Council until 1978 (see *R v Viro* (1978) 141 CLR 85).

<sup>320</sup> Kercher, above n 22, 93. See further *Trimble v Hill* (1879) 5 AC 342 at 345 where the Privy Council pronounced that it was “of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same.” See also Kercher, above n 22, 166-167.

*Oxley* and *Kelly* prosecutors exhibited bias against defendants and assumed the mantle of the zealous advocate who, despite firm strictures to the contrary, succumbed to adversarial temptation. This seems to have been especially apparent in the context of Australian society in the first half of the 1800s when local prosecutors confronted defendants who were not regarded as “gentlemen” and/or whose crimes were regarded as unacceptable and as posing a challenge to accepted notions of law and order in a society that manifestly saw itself under threat. However, I would suggest that it is important not to overstate the influence of these cases in the ultimate development of the prosecutorial role. As a matter of reality in Australia the prosecutor was required to function as a minister of justice and not as a partisan advocate or persecutor and such a formulation cannot be dismissed as mere rhetoric. Neither the development of an adversarial system of criminal justice nor changes to the structure of the criminal process that reduced the hitherto unequal position of the accused were to alter that role. Ultimately the prosecutorial role as a minister of justice was to emerge in Australia as a matter of reality and not just of rhetoric.

[3.7.5] In 1946 in *R v Bathgate*<sup>321</sup> the Australian courts finally confirmed, what seems to have been applied or assumed in any event for decades, that the appropriate role of the prosecutor was, indeed, that of a minister of justice.<sup>322</sup> In *Bathgate* the accused had been convicted of murder. Prosecution counsel at the trial had introduced objectionable and plainly inadmissible material.<sup>323</sup> The defence had failed to object to this. The Crown on appeal sought to justify the conduct of prosecution counsel at the trial by reference to the part played by defence counsel. Maxwell J of the New South Wales Court of Appeal was unimpressed. His Honour adopted with approval the now familiar formulation of the prosecutor's role as stated in *Puddick* and emphasised “that it cannot be too strongly impressed that the obligations of a Crown Prosecutor arose not merely by reference to the attitude adopted by the defence.”<sup>324</sup> The notion of the prosecutor as a minister of justice in Australia had finally received judicial imprimatur. As will be seen in the next Chapter, this role has been repeatedly reaffirmed and applied in both England<sup>325</sup> and Australia.<sup>326</sup>

[3.7.6] Recent cases such as *R v Livermore*<sup>327</sup> and *R v MG*,<sup>328</sup> however, have not only confirmed this role but have arguably applied it to situations that are far removed from the stark situations contemplated in the criminal process of nineteenth century England and Australia. It will be suggested in the next Chapter that modern cases such as *MG* and

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<sup>321</sup> (1946) 46 SR (NSW) 281.

<sup>322</sup> Why it took until 1946 for the prosecutor's role to be judicially confirmed in Australia is unclear.

<sup>323</sup> This material was the reference at length by prosecution counsel in his opening address to an inadmissible confession and seeking to introduce the accused's bad character when the issue of character had not been raised in the cross-examination of the accused.

<sup>324</sup> (1946) 46 SR (NSW) 281 at 284-85. See also Chapter 4, n 46.

<sup>325</sup> See *Mohammed v State* [1999] 2 WLR 552 at 564 and *R v Randall* [2002] 1 WLR 2237 at 2241-2242.

<sup>326</sup> See *R v Hay & Lindsay* [1968] Qd R 459 at 474-475 and 476-477, *R v McCullough* [1982] Tas R 43 at 56-57 and *R v Libke* (2007) 81 ALJR 1309.

<sup>327</sup> (2006) 67 NSWLR 659.

<sup>328</sup> (2007) 69 NSWLR 20.

*Livermore* have extended the concept of the prosecutorial role too far<sup>329</sup> and such cases might serve to raise questions as to whether a prosecutorial role that emerged in the particular climate of early nineteenth century England and was ultimately applied in Australia should remain unaltered in the vastly changed circumstances of the modern adversarial system of criminal justice in both Australia and England in the 21st century. Any dissent, however, to the notion that the role of the modern prosecutor remains that of a minister of justice has proved rare.<sup>330</sup> As was made clear by the Farquharson Committee in England in 1986, in comments which are equally pertinent to Australia, although the description of the role of prosecution counsel “as a minister of justice may sound pompous to modern ears” it still accurately describes the way in which he or she should discharge his functions.<sup>331</sup>

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<sup>329</sup> When one examines the facts of both *Livermore* and *MG* it is certainly arguable that the courts took the doctrine of the prosecutor as a minister of justice to inappropriate lengths that were far removed from the type of situation that prompted the development of the prosecutorial role as a minister of justice in England and Australia in the nineteenth century. This issue will be considered further in Part 4 of the next chapter.

<sup>330</sup> See, for example, Shapray, Ch 1, n 21; Grosman, Ch 2, n 303, 83; Grossman, Ch 1, n 249, 348-349 and Zellick, Ch 2, n 31, 499.

<sup>331</sup> See *Counsel*, Trinity 1986 quoted in Murphy (*Blackstone*, 2005 edition), Ch 2, n 87, 1485.

# CHAPTER 4

## **THE CONFIRMATION OF THE PROSECUTOR AS A MINISTER OF JUSTICE WITHIN A MODERN ADVERSARIAL SYSTEM: “INDIFFERENT BUREAUCRAT” OR “VENGEFUL ZEALOT”: AN IMPOSSIBLE BALANCING ACT?**

*This Chapter considers the modern confirmation in both Australia and England that the prosecutorial role remains one of a minister of justice and suggests that this role has been arguably extended to the extent that it gives rise to the risk of supine “Casper Minqueot” prosecutors. This Chapter will explore the tension between the prosecutor’s continued position as a minister of justice whilst acting as an active advocate in an adversarial system with a legitimate interest in seeking the conviction of the accused. It is argued that, despite the view of some commentators to the contrary, this tension is ultimately not capable of reconciliation. It is suggested that, while a purely partisan approach is inappropriate, it may be appropriate to reconsider the traditional role of a minister of justice to allow a more robust approach to aspects of the prosecutor’s role within a modern adversarial criminal process. In short, it will be argued that the modern prosecutor should be able to “kick butt but not kick groin.”*

### **Part 1: Introduction: the Modern Prosecutor: Indifferent Bureaucrat or Vengeful Zealot?**

“Because the Crown attorney is expected to act as a ‘minister of justice’ while simultaneously participating in an adversarial justice system, with every new case she is faced with the daunting task of finding the narrow path that separates the two unacceptable extremes. To stray too far in one direction is to risk becoming an indifferent bureaucrat who sacrifices public safety in the name of institutional

efficiency;<sup>1</sup> to wander too far in the other is to chance becoming a vengeful zealot whose narrow-mindedness may lead to wrongful convictions.”<sup>2</sup>

[4.1.1] This observation by Taylor and Byrne illustrates the fraught nature of the modern prosecutorial role. Taylor and Byrne highlight the longstanding dilemma that both historical decisions such as *Radbourne*,<sup>3</sup> *Jepson*<sup>4</sup> and *Palmer*<sup>5</sup> and modern decisions such as *R v Livermore*<sup>6</sup> and *R v MG*<sup>7</sup> have identified. That is how, within a modern adversarial system the prosecuting lawyer is to act as an active advocate whose role is to establish the guilt of the accused while at the same time being compelled by almost two centuries of etiquette, authority and precedent to act as a detached minister of justice whose only concern is to seek the truth. Henning has highlighted these competing pressures and asserts that “therefore, at the core of a prosecutor’s function lies a potentially irreconcilable conflict” between these two divergent forces.<sup>8</sup> Whether this tension has ever been entirely and satisfactorily reconciled is debatable.

[4.1.2] This Chapter will consider the modern reaffirmation and entrenchment in both England and Australia of the prosecutorial role as a minister of justice, with focus on the modern development of that role in Australia. This reaffirmation of the minister of justice role in the modern context raises a number of issues including:

1. The tensions created in the discharge of the prosecutorial role, especially arising from the acknowledgement that “the State too is entitled to a fair trial.”
2. Determining the practical content of the minister of justice role and the extent of the obligation that it imposes on prosecutors.
3. Whether the minister of justice role has outlived its original rationale, as explained in Chapter 2.

[4.1.3] Elsewhere this Thesis will consider two specific aspects of the prosecutorial role, namely the obligations of pre-trial disclosure of relevant material by the prosecution to the defence and the extent of the prosecution’s obligations in its choice of the witnesses that it will call at trial. This Chapter will focus on the conduct of the prosecution during trial. It is argued that the modern reaffirmation of the minister of justice role has set the

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<sup>1</sup> This is a particular criticism that has been directed at the CPS in England. Over its 20 odd year history the CPS has been mocked with nicknames such as the “Clown Prosecution Service” and the “Criminal Protection Society” (see, “So How Does the Crown Prosecution Service Reach All Those Odd Decisions,” *Evening Standard*, 8 November 2004, p 1 and 4) and being accused of failing to prosecute effectively and been over-willing to downgrade or drop charges (see Mills, H, “Prosecution Service Comes under Siege,” *The Independent*, 31 May 1995, p 10 and Pilkington, E, “Empty- Handed Justice,” *The Guardian*, section 2, May 30 1995, p 13).

<sup>2</sup> Taylor, P, and Byrne, S, “Reflections on Crown Attorneys and Cross-Examination” (2001) 45 *Crim LQ* 303 at 304.

<sup>3</sup> *R v Radbourne*, see Chapter 2, n 315.

<sup>4</sup> *R v Jepson*, see also Chapter 2, n 318.

<sup>5</sup> *R v Palmer*, see Chapter 2, n 75. See also *R v Kilmeister (No 2)*, Chapter 2, n 326.

<sup>6</sup> (2006) 67 NSWLR 659.

<sup>7</sup> (2007) 69 NSWLR 20.

<sup>8</sup> Henning, P, “Prosecutorial Misconduct and Constitutional Remedies” (1999) 77 *Wash U L Q* 713 at 727. See also Fisher, S, “In Search of the Virtuous Prosecutor” (1987) 15 *am Jour Crim Law* 197 at 217.

bar too high and has effectively robbed the modern prosecutorial role of its adversarial quality. The minister of justice role has been arguably extended to the extent that it gives rise to the risk of submissive prosecutors who may be constrained from either effectively advancing the prosecution case or testing the defence case. It is suggested that it may be appropriate to reevaluate the modern prosecutorial role (or at least aspects of it) in favour of a more active and vigorous role, especially in respect of the conduct of the prosecution case at trial.

## **Part 2: The Prosecutor’s Position in an Adversarial System: Time to “Fight Fire with Fire”?**

[4.2.1] There are occasional suggestions that the modern prosecutorial role, at least in respect of the conduct of the prosecution case at trial, should be that of an adversarial advocate as opposed to that of the traditional minister of justice.<sup>9</sup> However, it is striking that such suggestions have been almost uniformly rebuffed, not just in Australia and England (as this Chapter will consider) but across the common law world.<sup>10</sup> The notion that it may now be appropriate to “fight fire with fire” has been consistently rejected. As Turner observed as long ago as 1962:

The fact is that ‘most problems of man and society are very old,’ and that includes the problem of the role of the prosecutor. It may be thought by some that things have changed to such a degree... that the idea that the adversary system does not apply in criminal prosecutions is no longer a tenable one. It may be thought by some that under modern conditions, it is necessary to fight fire with fire, even though that involves placing counsel for the prosecution in the position of the enemy of the man in the prisoner’s dock. However, it is still essential that that man be deemed innocent until proved guilty. And so long as this is the case, it remains essential that counsel for the prosecution shall continue to act as a minister of justice, and not as an advocate in an adversary proceeding.<sup>11</sup>

[4.2.2] Turner, while recognising the tension in the dual prosecutorial roles of adversarial advocate and minister of justice, nevertheless, was of the view that the prosecutor in the modern age should not “fight fire with fire” and that the minister of justice role should remain paramount. The question is whether this approach should still prevail.

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<sup>9</sup> See, for example, Zacharias, F, “Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice?” (1991) 44 Vand L Rev 45 at 56, n 54 and 104; Uviller, H, “The Neutral Prosecutor: the Obligation of Dispassion in a Passionate Pursuit” (2000) 68 Ford L Rev 1695 at 1718; and Mitchell, G, “No Joy in This for Anyone’: Reflections on the Exercise of Prosecutorial Discretion in *R v Latimer*” (2001) 64 Sask L Rev 491 at 498-500.

<sup>10</sup> See, for example, *R v Murray & Mahoney* (1916) 33 DLR 702 at 710-711; *R v Chamandy* [1934] OR 208 at 225-226, *R v Boucher* [1955] SCR 16, *R v Munroe* (1995) 96 CCC (3d) 431; *Berger v US* (1935) 295 US 78 at 88, *Donnelly v De Christofaro* (1974) 416 US 637 at 648-649; *US v Mullins* (1994) 22 F (3d) 1365 at 1376; *Thompson v Calderon* (1997) 120 F (3d) 1045 at 1058; *People v P* [2003] 3 IR 550; *DPP v DO* [2006] IESC 12; and *R v Thomas (No 2)* [1974] 1 NZLR 658. See also Gersham, Ch 1, n 165, 314-315; Gourlie, Ch 1, n 211, 310-311; Green, B, “Why Prosecutors should seek Justice” (1999) 26 Fordham Urb L Jour 607; Green and Zacharias, Ch 1, n 15, 838; MacNair, Ch 1, n 41, 257; Medwed, Ch 1, n 42, 35-41; Savage, Ch 1, n 178, 164-165; and Smith, Ch 1, n 7, 355.

<sup>11</sup> Turner, Ch 2, n 22, 458-459.

[4.2.3] The underlying tension in the prosecutor’s proper role within the adversarial criminal process has been in existence since the early 1800s<sup>12</sup> with the emergence of the now familiar adversarial criminal process and the concurrent development of the role of the prosecutor as a minister of justice. This tension is demonstrated in the modern context by such cases as *Livermore* and *MG*. This particular tension is unique within the judicial process.<sup>13</sup> As was noted by Judge Smith, a former President of the Texas County and District Attorneys Association, when considering the American Bar Association Model Rules of Professional Conduct which prescribe that the role of the American prosecutor is “both an administrator of justice and an advocate”:

This mandate is quite paradoxical. On the one hand, it casts the prosecutor in the role as an advocate representing the people in an adversary proceeding, and on the other hand it restricts his functions as an advocate: in effect it says that the accused is one of the people whom he is to represent. Thus, the prosecutor’s role is initially encumbered with a conflict of interest, not known or tolerated in any other judicial proceeding.<sup>14</sup>

[4.2.4] This begs the question whether the prosecuting lawyer can perform concurrently both of these seemingly conflicting prosecutorial roles. Sir Malcolm Hilbery, a former Justice of the High Court in England, commented, “There is, perhaps, no occasion when the Barrister is called upon to exhibit a nicer sense of his responsibilities than when prosecuting.”<sup>15</sup> Though there are many assertions that the tension in prosecutorial roles is capable of reconciliation,<sup>16</sup> it is my argument that the notion of the modern prosecutor as a detached and non-partisan figure whose only concern is to promote the truth of the case is simplistic. The tension between the minister of justice and adversarial roles is ultimately not capable of reconciliation. It is unrealistic to expect the prosecuting lawyer to “wear two hats” in the discharge of his or her duties.

[4.2.5] Given that the law that prescribes the modern prosecutorial role developed in the first half of nineteenth century and can be viewed as a logical product of the criminal justice process of that time, it is surprising that its continued existence has remained largely unquestioned. The circumstances that gave rise to the prosecutorial role as a minister of justice do not exist to the same extent today and it is arguable that the original rationale for the development of the role is now weaker. The modern accused is not in the same disadvantaged position that he or she was in the early 1800s. The criminal justice system is not a rigid and immutable instrument and notions of the appropriate prosecutorial role as developed in the early 1800s need not necessarily apply unchanged to the present day. As was noted in an Irish case by O’Higgins CJ, “The general view of what is fair and proper in relation to criminal trials has always been the subject of change

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<sup>12</sup> Sutherland, Ch 2, n 88. See further the previous discussion in Part 9 of Chapter 2.

<sup>13</sup> Taylor and Byrne, above n 2, 303-304.

<sup>14</sup> Smith, R, “The Role of the Prosecutor in Texas,” 1973 Address, quoted by Douglass, J, *Ethical Issues in Prosecution* (Houston, University of Houston, 1988) p 24.

<sup>15</sup> Hilbery, M, *Duty and Art in Advocacy* (London, Stevens and Son, 1946) p 13.

<sup>16</sup> See, for example, Brooks, Ch 1, n 6, 236-237; Gersham, B, “Prosecutorial Ethics and Victim’s Rights: the Prosecutor’s Duty of Neutrality” (2005) 9 *Lew & Clark L Rev* 559 at 562-563; Turner, Ch 2, n 22, 458-460; Gersham, Ch 1, n 165, 353-354; Gourlie, Ch 1, n 211, 310-311; Melilli, Ch 1, n 12, 698-699; and MacNair, Ch 1, n 41, 260. See further the discussion in Part 9 of this Chapter.



and development.”<sup>17</sup> Despite the fundamental changes to the Australian and English criminal process the concept of the prosecutor as a minister of justice, as originally formulated in England and later embraced in Australia in spirit, if not initially always in practice, has survived surprisingly intact and unchallenged. The potential contradictions and inconsistencies of such a role, especially in a modern adversarial criminal process, have gone largely unremarked in both jurisdictions.<sup>18</sup>

[4.2.6] There are arguments that the legal process in both Australia and England is no longer “purely adversarial” as a result of the increasingly structured and case managed approach to modern criminal litigation that is occurring in the criminal courts.<sup>19</sup> But, notwithstanding such “reforms,” I would agree with Richardson that “the system of criminal justice in this jurisdiction remains an essentially adversarial one.”<sup>20</sup> It must also be accepted that for the foreseeable future the criminal process in both Australia and England will continue to be firmly based on the adversarial model.<sup>21</sup> It is against this fundamental backdrop that any consideration of the modern prosecutorial role must be considered.

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<sup>17</sup> *State v O'Donoghue* [1976] IR 325 at 350.

<sup>18</sup> Though not in other jurisdictions such as the United States (see Frank, J, and Frank, B, *Not Guilty* (New York, Doubleday and Company Ltd, 1957) p 231-242 and Canada (see, for example, the references in Ch 2, n 1, n 31 and 301.

<sup>19</sup> There have been pressures in both Australia and England on the criminal justice system to improve its “performance” and to curb mounting costs and delays, see Hunter, J, Cameron, C, and Henning, T, *Litigation II: Evidence and Criminal Procedure* (7<sup>th</sup> ed) (Chatswood, LexisNexis, 2005) p 712-716. There have been many reports and studies in both Australia and England designed to promote the criminal courts, notably before trial, to take a robust approach in “managing” the case and to identify the issues to be raised at an early stage and to “streamline” the whole process, both before and at trial. See, for example, Shorter Trials Committee, *Report on Criminal Trials* (Canberra, AIJA, 1985); Aronson, A, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (Carlton South, AIJA, 1992); Corns, C, *Anatomy of Long Criminal Trials* (Canberra, AIJA, 1997); Mack, K, and Anleu, R, *Pleading Guilty: Issues and Practices* (Carlton South, AIJA, 1995); Martin, B, *et al*, *Working Party on Criminal Trial Procedure: Report* (Canberra, Attorney-General's Department, 1999) and Moynihan, Ch 1, n 23, in Australia and Narey, Ch 1, n 150; and Auld, Ch 2, n 333, in England. There has been a raft of measures, especially in England, over recent years designed to promote the efficiency of the criminal justice system in order to contain ever mounting costs and delays, see the *Criminal Procedure Rules 2005*; the *Protocol for the Control and Management of Unused Material in the Crown Court*; the *Control and Management of Heavy Fraud and Other Complex Criminal Cases Protocol* in 2005 and, in particular, the 339 sections, 38 schedules and 453 pages of the *Criminal Justice Act 2003*. Such measures have not been without controversy but any study of this shift in approach is beyond this Thesis. It has been suggested that these reforms are not only motivated by a desire to reduce costs and delays but “have been designed to make the obtaining of a conviction easier,” see Richardson, J, “Comment [on *R v Gleeson*],” *Criminal Law Weekly*, Issue 39, 3 November 2003.

<sup>20</sup> Richardson, above n 19. See also *R v Ratten* (1974) 131 CLR 510 at 516-517 per Barwick CJ; *R v Whitehorn* (1983) 152 CLR 657 at 682 per Dawson J; *R v Marsh*, *The Times*, 6 July 1993; *R v Griffiths* (1996) 91 A Crim R 203 at 207 and *R v Randall* [2002] 1 WLR 2237 at 2241.

<sup>21</sup> The longstanding question of whether the adversarial or inquisitorial system of criminal justice “works better” and is superior in arriving at the truth is beyond the scope of this Thesis, see “Justice” Criminal Justice Committee (Report), “The Prosecution Process in England and Wales” [1970] Crim LR 668 at 675 and Hooper, Ch 2, n 303, 452-454, especially 452, n 31. See further the discussion in Chapter 1, n, 33. Further as Bennion argues, a “change to an inquisitorial system, even if it could be shown to be desirable, would be so fundamental in its effect upon institutions that had taken centuries to build as to be impossible on political and practical grounds,” see Bennion, Ch 2, n 11, 6, n 15. See also Auld, Ch 2, n 333, Ch 1 at [28]. See further Chapter 1, n 34.

[4.2.7] It is my argument that it is appropriate to reconsider the appropriate role of the modern prosecutor. Whilst a purely partisan or combative approach is inappropriate, with respect to some aspects of the prosecutorial role, especially in the conduct of the prosecution case at trial, the prosecutor should be free to assume a more adversarial role in the proceedings. It is clear that the prosecutor must always be fair but it is my argument that one can be a fair prosecutor without necessarily being a minister of justice. A prosecutor should not assume a supine “Casper Minqueot”<sup>22</sup> role and in some circumstances, contrary to Turner’s assertion, the modern prosecutor should be permitted to “fight fire with fire.”

### **Part 3: The English and Australian Prosecutor as a Minister of Justice in the Modern Age: “Pompous to Modern Ears”?**

[4.3.1] The classic modern formulation in England of the appropriate role of prosecution counsel is to be found in the introductory paragraph of the report of the Farquharson Committee that considered this issue in 1986:

There is no doubt that the obligations of prosecution counsel are different from those of counsel instructed for the defence in a criminal case or of counsel instructed in civil matters. His duties are wider both to the court and to the public at large. Furthermore, having regard to his duty to present the case fairly to the jury he has a greater independence of those instructing him than that enjoyed by other counsel. It is well known to every practitioner that counsel for the prosecution must conduct his case, albeit firmly. He must not strive unfairly to obtain a conviction; he must not press his case beyond the limits which the evidence permits, he must not invite the jury to convict on evidence which in his judgment no longer sustains the charge laid in the indictment. If the evidence of a witness is undermined or severely blemished in the course of cross-examination, prosecution counsel must not present him to the jury as worthy of a credibility he no longer enjoys... Great responsibility is placed upon prosecution counsel and although his description as a ‘minister of justice’ may sound pompous to modern ears it accurately describes the way in which he should discharge his function.<sup>23</sup>

[4.3.2] This proposition is almost universally accepted. Any suggestion that it may be opportune in the modern age to reconsider the modern role of the English prosecution lawyer has largely fallen on deaf ears.<sup>24</sup> The minister of justice role has been widely

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<sup>22</sup> This was a fictional cartoon character known for his timid and submissive nature.

<sup>23</sup> Quoted by Zander, M, *Cases and Materials on the English Legal System* (10<sup>th</sup> ed) (Cambridge, Cambridge University Press, 2007) p 270. The advice of the Farquharson Committee is strictly confined to members of the “independent” bar and not to either solicitors or employed barristers. However, the professional rules of conduct of both the Law Society and the Bar Council both prescribe a similar role for their members when they are prosecuting. This is logical. Whatever may or should be the precise role of the modern prosecutor, it is logical that any prosecutor, whatever his or her designation, should perform a similar professional role in practice.

<sup>24</sup> See, for example, the response to even the relatively minor change suggested in 2004 that the Crown Prosecution Service be renamed the “Public Prosecution Service” and to call prosecutors “public prosecutors.” See Rozenberg, J, and Davies, C, “Yet another Labour snub to the Queen,” *The Daily Telegraph*, 3 March 2004, p 1. The rationale of this bizarre suggestion according to the Home Secretary was that as the defence lawyer was always seen on the side of the accused, “We have to get across that the public prosecutors are not neutral, they are on the side of the public.” (Steele, J, “Blunkett may be jumping the gun over CPS name,” *The Daily Telegraph*, 3 March 2004, p 2).

endorsed by both academic commentators<sup>25</sup> and lawyers,<sup>26</sup> including eminent prosecutors<sup>27</sup> and at least one former Director of Public Prosecutions.<sup>28</sup> It is reflected in the official guidelines of various prosecuting agencies such as the Crown Prosecution Service<sup>29</sup> and is explicitly adopted in the professional rules for both solicitors<sup>30</sup> and barristers.<sup>31</sup> A study at Wood Green Crown Court in London in the early 1990s<sup>32</sup> revealed that prosecution barristers “adhered universally”<sup>33</sup> to the role of a minister of justice. The contributors to the study stated that their role was to “prosecute fairly” and, in classic minister of justice terms, that they saw their role as excluding the notion of victory or defeat.<sup>34</sup> The study further found that prosecution counsel adhered to this role in practice and not just in rhetoric.<sup>35</sup>

[4.3.3] The notion of the prosecutor as a minister of justice has been applied steadfastly by the courts in England on the, perhaps reassuringly, few occasions they have had to consider the prosecutor’s role in recent years.<sup>36</sup> This has been made especially plain by the Privy Council in a number of recent leading cases such as *Mohammed v State*<sup>37</sup> in 1998, *R v Randall*<sup>38</sup> in 2002, *R v Benedetto and Labrador*<sup>39</sup> in 2003 and *Ramdhani v State*<sup>40</sup> in 2005. In all of these cases the Privy Council allowed the appeals on account of

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<sup>25</sup> See, for example, Ashworth, A, “Prosecution and Practice in Criminal Justice” [1979] Crim LR 480 at 482; Bennion, Ch 2, n 11, 5 and 6-7; Sanders and Young, Ch 1, n 14, 190-209; Zander, above n 23, 271 and Bryett and Osborne, Ch 1, n 200, 16-18.

<sup>26</sup> See, for example, MacDonald, K, “Building a Modern Prosecution Authority” (2008) 22 Int Rev Law, Computers and Technology 7-16; Hastings, Ch 2, n 277, 287 and Ley, Ch 1, n 100.

<sup>27</sup> See, for example, Humphreys, Ch 1, n 1, 741; McGoe, Ch 1, n 4, 4-19; Bull, Ch 1, n 170, 95-96 and Matthew, J, “Public Prosecutions” in “A Criminal Case in England,” Panel Discussion (1971) 10 Am Crim L Rev 263 at 301.

<sup>28</sup> Skelhorn, N, *The Memoirs of Sir Norman Skelhorn: Public Prosecutor* (London, Harrap Ltd, 1981) p 39 and 72. Skelhorn was the first modern Director of Public Prosecutions in England from 1964 to 1977.

<sup>29</sup> See Crown Prosecution Service, *Code for Crown Prosecutors* (London, CPS, 2004) at [2.3].

<sup>30</sup> See Rule 21.19 of the previous *Solicitors Code of Conduct* (the present 2007 version deletes this reference) available at: <http://www.lawsociety.org.uk/professional/conduct/guideonline/view=page.law?POLICYID=480>.

<sup>31</sup> See [10.1] and [10A] of the *Written Standards for the Conduct of Professional Work* for barristers available at: <http://www.barstandardsboard.org.uk/assets/documents/Written%20Standards%20for%20the%20Conduct%20of%20Professional%20Work.pdf>.

<sup>32</sup> Rock, P, *The Social World of an English Crown Court: Witnesses and Professionals in the Crown Court Centre at Wood Green* (Oxford, Clarendon Press, 1993).

<sup>33</sup> *Ibid*, 170.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*, 65. See, for example, *R v Simpson* [2001] EWCA Crim 468 for a notable minister of justice approach.

<sup>36</sup> See *R v Gonez* [1999] All ER (D) 674 and *R v Ikram & Paveen* [2008] Crim LR 912. The comparative absence in England, unlike Australia, of assertions on appeal of prosecutors failing to conform to the role of a minister of justice is notable. The reason for this is unclear.

<sup>37</sup> [1999] 2 AC 111.

<sup>38</sup> [2002] 1 WLR 2237.

<sup>39</sup> [2003] 1 WLR 1545.

<sup>40</sup> [2006] 1 WLR 796. The following passionate, if inelegant exhortation of prosecution counsel particularly attracted the critical scrutiny of the Privy Council: “You, Madame Forelady and Members, are the defenders of this society. You are the ones who stand between the destruction of this society. You are the ones who stand up

the inappropriate conduct of prosecution counsel at trial. Lord Bingham in *Randall* explained that while the trial process would be “emasculated” if a standard of perfection were imposed that was incapable of attainment, the right of an accused to a fair trial remained absolute and when the departure from good prosecutorial practice was so gross, or so persistent, or so prejudicial, or so irremediable, an appellate court would have no choice but to condemn the trial as unfair and quash the conviction as unsafe, however strong the grounds for believing the defendant to be guilty.<sup>41</sup> The prosecutorial role of a minister of justice was viewed by Lord Bingham as an integral part of the accused’s fundamental right to a fair trial.<sup>42</sup>

[4.3.4] Accordingly, the decisions of the Privy Council must be regarded as powerful modern reaffirmation in England of the notion of the prosecutorial role as a minister of justice. No matter how grave the offence<sup>43</sup> or how overwhelming the evidence may be,<sup>44</sup> any prosecutor who departs from the role of a minister of justice does so at the peril of the whole prosecution case. Furthermore, no matter how “closely contested” or “highly charged” the proceedings might prove, the minister of justice role prevails.<sup>45</sup> Even in the face of an obstructive defendant and/or defence advocate the prosecutor is still expected to adhere strictly to this role. As Lord Mance observed in *Ramdhani*, “The high standards required of prosecuting counsel, as a ‘minister of justice’ do not depend on defence counsel’s compliance with the rules governing their conduct of the defence.”<sup>46</sup>

[4.3.5] The position in Australia has proved similar. In contrast to the comparative absence of historical judicial statements in Australia on this issue,<sup>47</sup> there is no shortage of modern judicial pronouncements that demonstrate the continued adherence in Australia to the notion of the prosecutor as a minister of justice. The leading modern

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and strike a blow for decency, who strike a blow for the clean society, who are not sucked in by this broad paint brush [sic] that everyone is a bandit and a thief, well, then I must pass with a brush [sic] because I am putting forward a case in all conscientiousness. And do not think that I do not, as it is my profession, examine and twist and turn and look at everything, and I am convinced myself, before I ever appear in any court in any case. So go tell it in Gath. Go into your highways and the byways. Let your verdict speak for Trinidad and Tobago. Let it speak volumes. Let us not be taken in by inconsistencies.” [2006] 1 WLR 796 at 808.

<sup>41</sup> [2002] 1 WLR 2237 at 2251. Lord Bingham made it clear this was such a case.

<sup>42</sup> *R v Randall* [2002] 1 WLR 2237 at 2241. See also the discussion in Part 4(2) of Chapter 1 at [1.4.2.7].

<sup>43</sup> In *Mohammed and Bendetto & Labrador*, for example, the defendants were charged with murder.

<sup>44</sup> See *R v Randall* [2002] 1 WLR 2237 at 2250.

<sup>45</sup> [2002] 1 WLR 2237 at 2241.

<sup>46</sup> [2006] 1 WLR 796 at 809. See also McGoe, Ch 1, n 4, 4-16. It is clear that cases of defence obfuscation or partisan gamesmanship are far from unique, in either England (see, for example, *R v Bromley Magistrates’ Court, ex parte Smith* [1995] 4 All ER 146, *R v Pydar Justices* [1995] 160 JP 87, *Hughes v DPP* [2003] EWHC Admin 2470, *R v Gleeson* [2004] 1 Cr App R 406, *Murphy v DPP* [2006] EWHC 1753 and *Malcolm v DPP* [2007] EWHC Admin 363) and Australia (see, for example, *R v Richardson* (1973) 131 CLR 116 at 123, *R v Higgins* (1994) 71 A Crim R 429, *R v Wilson & Grimwade* (1994) 73 A Crim R 190, *R v Eastman* (1995) 84 A Crim R 118, *R v Sandford* (1994) 72 A Crim R, especially at 188-189, *R v Carter* (1997) 19 WAR 8 and *R v Dowding* [2000] SASC 439). To expect the prosecutor to assume the mantle of a minister of justice within an adversarial criminal process is already difficult. But, to insist that the prosecution lawyer should turn a proverbial “other cheek” to an obstructive and vexatious defendant and/or defence counsel is something of a “tall order.” See further the discussion of this issue in Part 11 of this Chapter.

<sup>47</sup> See the discussion in Part 1 of Chapter 3.

formulation that was offered by Deane J in 1980 in *R v Whitehorn*<sup>48</sup> is typical. His Honour commented:

Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.<sup>49</sup>

[4.3.6] This role has been consistently applied in Australia.<sup>50</sup> In many cases convictions have been quashed on the basis that the prosecutor departed from his or her proper role as a minister of justice.<sup>51</sup> Even in those cases where on the facts the courts have felt able to uphold the defendant's conviction,<sup>52</sup> they have not shirked from castigating the prosecutor if his or her conduct is deemed to have strayed from the correct role.<sup>53</sup>

[4.3.7] The formulation in Australia of the prosecutor's role as a minister of justice is not confined to judicial endorsements in cases such as *Whitehorn*. This role is also widely promulgated in Australia, as in England, by both professional guidelines<sup>54</sup> and the Codes of Conduct of public prosecuting agencies.<sup>55</sup> In both England and Australia the notion of the prosecutor as a minister of justice remains powerful.

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<sup>48</sup> (1983) 152 CLR 657.

<sup>49</sup> (1983) 152 CLR 657 at 663-664. See also *R v Stanoevski v The Queen* (2001) 202 CLR 115 at 129 at [54]; *R v Subramaniam* (2004) 79 ALJR 116 at 127-128 at [52]-[54]; and *R v Libke* (2007) 81 ALJR 1309 at 1320 at [41], 1327 at [83], 1333-1334 at [121]-[126].

<sup>50</sup> See, for example, *R v Hay & Lindsay* [1968] Qd R 459 at 474-475; and 476-477 and *R v McCullough* [1982] Tas R 43 at 56-57.

<sup>51</sup> See, for example, *R v Vella* [1990] 2 WAR 537; *R v Anderson* (1991) 53 A Crim R 421; *R v Ciseau* [1994] QCA 473; *R v R* (1997) 99 A Crim R 327; *R v MRW* (1999) 113 A Crim R 308; *R v Kennedy* (2000) 118 A Crim R 34; *R v Tran* (2001) 1118 A Crim R 218; *R v Patterson* [2004] WASCA 63; and *R v Smith* [2007] QCA 447.

<sup>52</sup> It can seem arbitrary where the judicial line will be drawn between inappropriate prosecutorial conduct which will lead to a conviction being quashed and when it will not.

<sup>53</sup> See, for example, *R v Alister* (1984) 154 CLR 404; *R v Bazley* (1986) 21 A Crim R 19; *R v Pernich & Maxwell* (1991) 55 A Crim R 464; *R v Callaghan* (1993) 70 A Crim R 350; *R v Beydag*, unreported, Court of Appeal of Victoria, 25 November 1996, No 150/1996; *R v DDR* [1998] 3 VR 580; *R v L* [2001] QCA 535; *R v Freer & Weekes* [2004] QCA 97; *R v Libke* (2007) 81 ALJR 1309; and *R v Kemp* [2008] QCA 355.

<sup>54</sup> See, for example, Rule 62 of the *Australian Bar Association Model Rules* available at: <http://www.Austbar.asn.au/images/stories/PDFs/CurrentABAModelRules2002.pdf>; Rule 62 of the *New South Wales Bar Rules* and Rule 23.A.62 of the *New South Wales Solicitors Rules* 1995 and Rule 9.2 of the *South Australian Bar Rules*.

<sup>55</sup> See Guideline 1 of the *Guidelines for Prosecutors* (ACT) available at: <http://www.dpp.act.gov.au/Guidelines%20for%20Prosecutors.html>; *Prosecution Policy of the Commonwealth*, p 3, available at: <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>, (“servant of justice”); Guideline 2 of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, p 5-6, available at: [http://www.odpp.nsw.gov.au/guidelines/Full\\_Guidelines.pdf](http://www.odpp.nsw.gov.au/guidelines/Full_Guidelines.pdf); Guideline 1.2(2) of the *Prosecution Guidelines* 2005 (NT) available at: <http://www.nt.gov.au/justice/dpp/html/guidelines.html>; Guideline 1 of the *Director's Guidelines* 2010 (Qld); the *Statement of Prosecution Policy and Guidelines* (SA), p 2-3, available at: [http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf); Guideline 1 of the *Director's Guidelines* (Qld) available at: [http://www.justice.qld.gov.au/data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/data/assets/pdf_file/0015/16701/Directors-guidelines.pdf), Guideline 1.1.3 of the *Prosecution Policy and Guidelines* 2010 (Vic) (see also Guideline 1.1.5-1.1.6) available at:

#### Part 4: The Minister of Justice in Real Life: Practical Application of the “Silver Thread”

[4.4.1] The “silver thread” of the criminal law for the prosecutor to act as a minister of justice<sup>56</sup> cannot be dismissed as mere rhetoric. It finds practical expression in a wide variety of situations. Though the precise content and extent of the duty is still being developed, a number of broad propositions have been established.

[4.4.2] The prosecution lawyer must approach the accused in an objective manner and with an absence of partiality, either negative or positive.<sup>57</sup> The prosecutor must deal dispassionately with the facts of the case, no matter how emotive or heinous they may be, “uncoloured by subjective emotions or prejudices.”<sup>58</sup> No matter how high profile or sensational the case or the accused may be the same objective duty of a minister of justice still applies.<sup>59</sup> Indeed, the more high profile the case is, the more important the prosecutor’s duty to act as the restrained minister of justice.<sup>60</sup> The prosecutor should only institute or continue criminal proceedings and pursue a case to trial if there exists adequate evidence to afford a “reasonable”<sup>61</sup> or “realistic”<sup>62</sup> prospect of conviction. It would be “unfair to the accused”<sup>63</sup> and incompatible with the prosecutor’s position as a minister of justice to prosecute on the basis of some lesser test.<sup>64</sup> A criminal prosecution must be genuinely in the public interest. As Wilcox notes, “No statute has ever been drafted in which an officious busybody could not discover sooner or later, some infringement which would be too trivial, too vexatious or too ridiculous to prosecute.”<sup>65</sup>

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<http://opp.vic.gov.au/wps/wcm/connect/justlib/office+of+public+prosecutions/home/opp+-+prosecution+policies> and *Statement of Prosecution Policy and Guidelines 2005* (WA), p 6 at [9] and [11], available at: [http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf). The Tasmanian DPP, perhaps surprisingly, makes no reference to the minister of justice (or any other for that matter) role, see *Prosecution Guidelines* (Tas), available at: [http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines).

<sup>56</sup> *R v Pearson* (1957) 21 WWR (NS) 337 at 348.

<sup>57</sup> *R v Regan* (2001) 161 CCC (3d) 97 at 157 per Binnie J.

<sup>58</sup> *R v Regan* (2001) 161 CCC (3d) 97 at 157 per Binnie J. See also *R v M* [1991] 2 Qd R 68 at 82-83.

<sup>59</sup> See *R v Regan* (2001) 161 CCC (3d) 97 at 152 per Binnie J. See further Rapke, J QC, “Seeking Justice and Seeking Convictions: Striking the Proper Prosecutorial Balance in High Profile Cases,” Speech at the University of Melbourne, January 2008, available at: [http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eb78a9415660809/Seeking\\_Justice\\_and\\_Seeking\\_ConvictionsStriking\\_the\\_Proper\\_Prosecutorial\\_Balance\\_in\\_High\\_Profile\\_Cases.pdf](http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eb78a9415660809/Seeking_Justice_and_Seeking_ConvictionsStriking_the_Proper_Prosecutorial_Balance_in_High_Profile_Cases.pdf).

<sup>60</sup> *R v Curragh Inc* (1997) 113 CCC (3d) 481 at 517.

<sup>61</sup> This is the expression that is used in the professional guidance of the various DPP’s offices in Australia.

<sup>62</sup> This is the expression that is used in England by the CPS. This test has proved problematic and has been variously interpreted as ranging from something just above fanciful to almost certain, see Mills, B, “The Code for Crown Prosecutors” (1994) 158 JPN 461. It is defined in the present *Code for Crown Prosecutors* as being that a conviction is more likely than not.

<sup>63</sup> Royal Commission on Criminal Procedure, Ch 2, n 262, 127.

<sup>64</sup> *Proulx v Quebec (Attorney-General)* [2001] 3 SCR 9 at [31]. See further May, Ch 1, n 176, 90 and Skelhorn, above n 28, 72.

<sup>65</sup> Wilcox, A, *The Decision to Prosecute* (London, Butterworths, 1972) p 69. Wilcox gives the example of prosecuting the driver of an untaxed car on the day the cheque for repayment had been sent. There has to be a process of selective prosecution as prosecutorial resources are, like those of any public funded agency, finite and it

The prosecutor should assess each case on its merits to determine if it is appropriate that the Crown should seek for the accused to be kept in custody till his or her trial. To oppose bail in every case or without exception where a particular crime is charged or because of the views of the victim or the investigator “derogates from the prosecutor’s role as a minister of justice and as a guardian of the civil rights of all persons”<sup>66</sup> within the criminal justice system. The prosecutor should only prefer those charges that are necessary to reflect properly the alleged criminality of the accused and it is wrong to “throw the book” at the accused.<sup>67</sup> The “minister of justice” duty equally applies to all those involved in the preparation of the prosecution case for trial, as to prosecution counsel in the conduct of the trial.<sup>68</sup>

[4.4.3] The prosecutor at trial is enjoined from resorting to either inflammatory or offensive language<sup>69</sup> or from making appeals to a jury based purely on passion or prejudice,<sup>70</sup> especially in cases such as the alleged sexual abuse of children that typically give rise to strong feelings.<sup>71</sup> The prosecutor must refrain from conveying his or her personal feelings about the guilt of the accused or the strength of the evidence.<sup>72</sup> He or she must not criticise the framework designed to secure a fair trial for the accused.<sup>73</sup> The prosecutor must be astute not to “coach” or “tailor” the evidence of a prosecution witness for trial.<sup>74</sup>

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is neither possible nor desirable to prosecute all the crimes that come to the attention of the authorities (which in itself are only those crimes which are reported and lead to an arrest). See Potas, Ch 1, n 214, 38. The criminal offences which ultimately are the subject of prosecution are literally the “tip of the criminal iceberg,” see *Ibid*.

<sup>66</sup> *R v Brooks* (2001) 153 CCC 533 at 543 per Casey Hill J. See further Rosenberg, Ch 1, n 187, 857-861.

<sup>67</sup> May, Ch 1, n 176, 91.

<sup>68</sup> See *R v Lucas* [1973] VR 693 at 705 and *R v Regan* (2002) 161 CCC (3d) 97 at 157. This is a crucial point in practice as, contrary to the impression gained from the fictional world of Perry Mason, the bulk of the “work” in a criminal case happens “outside” court as opposed to “inside” court. See Baldwin, J, and McConville, M, *Courts, Prosecution and Conviction* (Oxford, Clarendon Press, 1981) p 10. See also below n 287.

<sup>69</sup> See, for example, *R v Gonez* [1999] All ER (D) 674; *R v Penrich & Maxwell* (1991) 55 A Crim R 464 at 472-473; *R v McCullough* [1982] Tas R 43 at 58; and *R v Tran* (2000) 118 A Crim R 218 at 238.

<sup>70</sup> See, for example, *R v House* (1921) 16 Cr App R 49; *R v McCullough* [1982] Tas R 43 at 59; *R v Benedetto & Labrador* [2003] 1 WLR 1545 at 1565-1566; *R v Labarre* (1978) 145 CCC (2d) 171 at 174-175; and *R v R* (1997) 99 A Crim R 327.

<sup>71</sup> See *R v M* [1981] 2 Qd R 68 at 83 and *R v DeJesus* (1986) 61 ALJR 1 at 3 per Gibbs J.

<sup>72</sup> See, for example, *R v Palmer* (see Chapter 2, n 75; and the discussion on this point in Part 9 of Chapter 2 at [2.9.9]), *R v Boucher* [1955] SCR 16 and *R v MG* (2006) 73 NSWLR 20. See also see Glissan, J, and Tilmouth, S, *Advocacy in Practice* (3<sup>rd</sup> ed) (Sydney, Butterworths, 1998) p 222.

<sup>73</sup> *R v Webb* (1996) 186 LSJS 184.

<sup>74</sup> This has proved a particular fear in England, see *R v Dye*, *The Times*, 19 December 1991; *R v Skinner* [1994] 99 Cr App R 212; *R v Momodou* [2005] 1 WLR 3442; and *R v Salisbury* [2005] EWCA Crim 3107. This fear of “coaching” extends in England, though not in Australia, to all prosecution lawyers (and any barrister) being prevented by professional rules of conduct from discussing with a witness his or her evidence. In England the fear of been accused of “coaching” has led to a strong fear in prosecutors of even being seen talking to a witness. Ironically, in NSW where such interviews of witnesses by prosecutors are routine, allegations of coaching or contamination of testimony are rare. See Goldsmith, P Lord, *Pre-Trial Witness Interviews by Prosecutors Report* (London, Office of the Attorney-General, 2004). See further Gersham, B, “Witness Coaching by Prosecutors” (2002) 23 Cardozo L Rev 829; Williams, G, “The Proposals for Hearsay Evidence” [1973] Crim LR 76-77 and Watson, A, “Witness Preparation in the United States and England and Wales” (2000) 164 JPN 816 at 822.



[4.4.4] The prosecutor as a minister of justice must not lose sight of the fact that he or acts on behalf of the public at large. “The Crown Attorney is not simply the lawyer for the police and/or victim of crime.”<sup>75</sup> Though the modern prosecutorial role must be “scrupulous in attention to the welfare and safety of witnesses,”<sup>76</sup> the prosecuting lawyer must be astute to avoid been cast as “the creature of a private interest” in the exercise of his or her powers.<sup>77</sup> Prosecution counsel has “wider interests to consider than just the interests of the victim.”<sup>78</sup> The prosecutor should never regard him or herself as the advocate for the police or other investigatory agency or, as Lord Bingham more colloquially put it, the prosecutor should not be “in the pocket of the police”.<sup>79</sup> There is widespread acceptance in common law jurisdictions that it is essential there is a clear separation between the roles of investigator and prosecutor.<sup>80</sup> This division in roles, whilst not absolute,<sup>81</sup> is of a functional, legal and ethical nature and it is important that the prosecuting lawyer does not become too closely or intimately involved in the investigation on account of undermining his or her professional objectivity.<sup>82</sup>

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<sup>75</sup> Brooks, Ch 1 n 6, 236.

<sup>76</sup> *R v Logiaccio* (1984) 11 CCC (3d) 374 at 379 per Cory J. See also Hall, M, “The Relationship between Victims and Prosecutors; Defending Victim’s Rights?” [2010] Crim LR 31 at 38-40. The modern need for the prosecutor to be responsive to the views and welfare of victims poses real issues as to prosecutor’s status as a minister of justice acting on behalf of the public at large, see *Ibid*, 31-32 and Mack and Anleu, above n 19, 52. See further the discussion in Part 11 of this Chapter at [4.11.3].

<sup>77</sup> *R v Milton Keynes Magistrates’ Court; ex parte Roberts* [1995] Crim LR 225. See further *Proulx v Quebec (Attorney-General)* [2001] 3 SCR 9 and *R v Leominster Magistrates Court* [1996] EWHC Admin 384 where in both cases prosecution counsel in criminal proceedings fatally allowed their professional objectivity to be influenced by private interests in the cases to such an extent as to fatally undermine the integrity of the criminal proceedings. The need for objectivity and independence in this context also extends to the decision to prosecute (see *R v Adaway*, *The Times*, 22 November 2004) and the police investigation of the alleged crime (see *R v Hounsham & Ors* [2005] EWCA Crim 1366 at [31] and *R v Moti* [2009] QSC 4 at [87]-[90]).

<sup>78</sup> See *R v DPP, ex parte Stacey*, unreported, Divisional Court, No CO/714/99, 20 October 1999, Transcript, p 26 per Turner J. For a robust expression of this principle see *R v Tkachuk* (2001) 159 CCC (3d) 434 at 441-442.

<sup>79</sup> Quoted by Baldwin, J, and Hunt, A, “Prosecutors Advising in Police Stations” [1999] Crim LR 521 at 522, n 8. See also *Ibid*, 521-522 and Rosenberg, Ch 1, n 187, 847-848. For an application of this principle, see *Dix v Attorney-General* [2002] AJ No 784.

<sup>80</sup> See, for example, *R v Regan* (2002) 161 CCC (3d) 97 at 126-127 per LeBel J and 158-159 per Binnie J; Gower, J Judge QC, and Hammond, A, *Review of Prosecutions Conducted by the Solicitor’s Office of HM Customs and Excise* (London, Office of the Attorney-General, 2000) p 20 at [8.2]-[8.3] and Wood, J Justice, *Royal Commission into the New South Wales Police Service (Volume 3)* (Sydney, 1997) p 316. For a differing view see Ensor, Ch 2, 217, 21; White, R, “Investigators and Prosecutors or Desperately Seeking Scotland: Reformulation of the Phillips Principle” (2006) 69 Mod L Rev 143 and Moody, S, and Toombs, J, *Prosecution in the Public Interest* (Edinburgh, Scottish Academic Press, 1982) p 47. See also the earlier discussion in Chapter 1 at [1.2.14].

<sup>81</sup> Prosecutors may be involved in assisting with legal and other issues arising from the investigation. “As a matter of practice, it is difficult to achieve a total separation. The two roles [of investigation and prosecution] overlap and intertwine” (Royal Commission on Criminal Procedure, Ch 2, n 262, at [6.30]) See also Bugg, Ch 1, n 26 and Addison, N, “Tell me what you really want” (1998) 148 NLJ 1061. It has been accepted that it is not wrong, and can even be beneficial, for the prosecuting lawyer to assist with the investigation of a criminal case, providing the prosecutor’s objectivity is not compromised, see *R v Regan* (2001) 161 CCC (3d) 97 and *R v Karounos* (1995) 63 SASR 451.

<sup>82</sup> See *Dix v Attorney-General* [2002] AJ No 784 at [292]-[294].



[4.4.5] The prosecutor’s role as a minister of justice was understood traditionally as precluding the prosecutor from playing any role at sentence.<sup>83</sup> Though this has now been qualified to the extent that it is now accepted that the prosecutor does have a significant role to play at sentence,<sup>84</sup> “the obligation of scrupulous fairness remains absolute.”<sup>85</sup> It is wrong for the prosecutor to urge a harsh or vindictive sentence.<sup>86</sup> Even a private prosecutor, who is the alleged victim acting in his or her own capacity, has been held to be subject to the same obligations of a minister of justice as a public prosecutor.<sup>87</sup>

### **Part 5: *R v MG* and *R v Livermore*: A Timely Reaffirmation of the Minister of Justice or a Counsel of Perfection?**

[4.5.1] Whilst the concept and broad framework of the minister of justice role is firmly established, the extent and precise nature of the obligations arising from this role are still being developed. However, some recent decisions, notably a series of decisions in New South Wales,<sup>88</sup> appear to impose a degree of “detachment” or “restraint” on the discharge of the prosecutorial role that potentially entails the risk pointed to by Lord Bingham in *Randall* of “emasculating” the adversarial quality of the criminal trial. Two recent New South Wales decisions, *R v Livermore* in October 2006 and *R v MG* in March 2007, particularly raise concern in this regard. Arguably these two cases impose a standard of non-combativeness and constraint upon the prosecutorial role that is at odds with the adversarial trial process. These decisions may extend the minister of justice role too far.

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<sup>83</sup> See, for example, Humphreys, Ch 1, n 1, 747 and *R v Atkinson* [1978] 2 All ER 460. See also Chapter 2, n 31.

<sup>84</sup> See, for example, *R v Street*, *The Times*, 31 March 1997; *R v Blight & Ors* [1999] Crim LR 426; *R v Beglin* [2003] 1 Cr App R (S) 88 (21); *R v Causby* [1984] Tas R 54; *R v GAS* (2004) 217 CLR 198 and *R v MacNeil-Brown* [2008] VSCA 190. This “active” (though not unlimited, see below n 87) role is also supported by prosecutorial guidelines in both England (see [A1], [B4] and [B5] of the *Attorney-General’s Guidelines on the Acceptability of Pleas* 2009) and Australia (see, for example, Guideline 28 of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*; Guidelines 16.1-16.3 of the *Prosecution Guidelines* (NT); Guideline 44 of the *Director’s Guidelines* (Qld); Guideline 8 of the *Statement of Prosecution Policies and Guidelines* (SA), p 12-13; Guideline 9.7.1.5 of the *Prosecution Policy and Guidelines* (Vic) and the *Statement of Prosecution Policies and Guidelines* (WA), p 24 at [138]). The explanation for this increased prosecutorial role in sentence lies with the advent of prosecution appeals against sentence and the prosecution’s duty to avoid the court falling into appealable error as well as the increasing complexity of modern sentencing law and options, see Warner, Ch 2, n 31, 26 and the majority discussion in *R v MacNeil-Brown* [2010] VSCA 190. See generally Campbell, I, “The Role of the Prosecutor in Sentence” (1985) 9 Crim LJ 202 and Freiberg, A, and Fox, R, “Silence is not Golden: The Function of Prosecutors at Sentencing in Victoria” (1987) 61 LJ 555 at 557. Though the modern enhanced prosecutorial role at sentence gives rise to interesting questions, it is not one of the case studies selected for this Thesis.

<sup>85</sup> See also *Attorney-General’s Reference (No 80 and 81 of 1999)* [2000] Cr App R (S) 138 at 146.

<sup>86</sup> See, for example, Guideline 9.7.1.7 of the *Prosecution Policy and Guidelines* (Vic) and Rule 9.4(c) of the *South Australian Bar Rules*. See also *R v Tait & Bartley* (1979) 24 ALR 473 at 477 and *R v Travers* (1983) 34 SASR 112 at 116. The prosecutorial role in England and Australia at sentence is still limited. Unlike the United States (see Gerber, Ch 1, n 215, 139), in Australia and England the practice remains not to advocate a sentence of a particular magnitude, see Warner, Ch 2, n 31, 26 and *R v Casey and Wells* (1985) 20 A Crim R 191 at 196.

<sup>87</sup> See *R v Belmarsh Magistrates’ Court, ex parte Watts* [1999] 2 Cr App R 188. See further the discussion in Part 7 of Chapter 2.

<sup>88</sup> See *R v MRW* (1999) 113 A Crim R 308, *R v Kennedy* (2000) 118 A Crim R 34; *R v Rugari* (2001) 122 A Crim R 1; *R v Attallah* [2005] NSWCCA 227; *R v Liristis* (2004) 146 A Crim R 547; and *R v KNP* (2006) 67 NSWLR 227. See also *R v Gonzales* [2007] NSWCCA 321 and *R v Causevic* [2008] NSWCCA 238.

*Livermore* and *MG* may not represent new law but they serve as both a strong reaffirmation that the role of the prosecutor remains one of a minister of justice and illustrate the difficulty in a modern adversarial process of reconciling the prosecutorial roles of minister of justice and active advocate.

[4.5.2] In *Livermore* the accused had been convicted of serious sexual offences. He was a friend of the victim’s boyfriend, Mick. The victim and Mick gave evidence for the Crown at trial. Though the accused refused to be interviewed and chose not to give evidence,<sup>89</sup> his defence at trial suggested that the sexual contact had been consensual. Mick’s account disclosed that his unsympathetic response on discovering the apparent fact that his girlfriend was, or had just been, raped was to accuse her of “cheating” on him.<sup>90</sup> This would seem to have indicated that, initially at least, he did not think that his girlfriend had been raped. In his closing address the prosecutor had described parts of the defence case as “bizarre” and “silly” and that he had not seen a plot so bad, even on the television show, “Desperate Housewives.”<sup>91</sup> Mick was described by prosecution counsel as an “idiot” on account of his apparent “thinking or apparent lack of thought and compassion against [the complainant].”<sup>92</sup> The prosecutor made several observations regarding the personal worth (or rather lack of worth) that he attached to the weight of Mick’s initial reaction and apparent conclusion. The prosecutor also made a number of personal observations about the evidence and the defence case and asserted that the actions of the victim in promptly showering or bathing herself after the alleged attack were borne out by what he had seen “in almost every movie I’ve ever seen where a woman is raped.”<sup>93</sup>

[4.5.3] Defence counsel complained to both the trial judge and the Court of Appeal about the prosecutor’s address. The trial judge commented that he thought the prosecutor’s address was “rather more enthusiastic and laced with personal observation” than His Honour had usually encountered in trials of this nature.<sup>94</sup> The Court of Appeal went much further. It considered that the combination of features noted above represented “a serious departure from the standards of fairness required of a Crown Prosecutor.”<sup>95</sup> The court was especially critical of the prosecutor’s references to Mick as an “idiot.” These were held to be “highly improper.”<sup>96</sup> The prosecutor’s remarks in this context represented an “insidious” and “intemperate attack” on a prosecution witness who was integral to the defence case. They were designed both to arouse prejudice towards Mick and to “ridicule and belittle” the defence case theory that the victim had consented.<sup>97</sup>

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<sup>89</sup> In England this course of action would entitle the prosecutor to invite the jury to draw an adverse inference.

<sup>90</sup> Mick described the victim’s highly distressed demeanour and hearing her tell the accused in a frightened voice “to stop.” Though the defence contended that some parts of Mick’s evidence assisted their case, it beggars belief that any reasonable male would have accused his girlfriend of just having “cheated” on him.

<sup>91</sup> I would certainly share the prosecutor’s opinion of the quality of the plots to “Desperate Housewives.”

<sup>92</sup> Noting Mick’s account, one can, perhaps, understand this assessment of him.

<sup>93</sup> (2006) 67 NSWLR 659 at 662-663.

<sup>94</sup> *Ibid* at 664.

<sup>95</sup> *Ibid* at 668.

<sup>96</sup> *Ibid* at 667.

<sup>97</sup> *Ibid* at 667-668.

[4.5.4] The court reviewed a number of recent Australian decisions, the ethical obligations in both the *New South Wales Barristers’ Rules* and the *Solicitors’ Rules of New South Wales* and, finally, the *Prosecution Guidelines* of the State Director of Public Prosecutions. The well-known proposition that prosecutors are to regard themselves as ministers of justice and that a prosecution must always be “conducted with fairness towards the accused and with the single view to determining and establishing the truth”<sup>98</sup> was held to represent the “contemporary and continuing obligation of a prosecutor to present a case fairly and completely.”<sup>99</sup> In light of this well-established doctrine the court held that it is not part of the prosecutor’s role at trial to “ridicule or belittle” the defence case.<sup>100</sup> The court emphasised that the role of the prosecutor has to be performed “without any concern” as to whether the case is won or lost and the sole objective of the prosecutor is “to expose the truth which may or may not result in a conviction.”<sup>101</sup> The court held that the prosecutor in the present case had failed to meet the high expectations of his role and in such circumstances the conviction had to be quashed and a retrial ordered.

[4.5.5] The court did not trouble to conceal its exasperation in being confronted with the appeal that had come before it:

This Court might be forgiven for thinking that repeated condemnation of similar Crown addresses appears to have fallen on deaf ears. This is the latest in a series of appeals before this Court where a ground of appeal has alleged extravagant and improper submissions being advanced by a Crown Prosecutor during the closing address to a jury.<sup>102</sup>

[4.5.6] The court concluded with a clarion call that in future it expected all Crown Prosecutors to adhere to their obligations as a minister of justice as imposed by the formidable authority of their professional ethical rules, the guidelines of the Director of Public Prosecutions and well-established case law.<sup>103</sup>

[4.5.7] *Livermore* is an emphatic reaffirmation of the notion that the prosecutor must act as a minister of justice. But, did the prosecutor in *Livermore* really deserve the condemnation accorded to him by the Court of Appeal? The much criticised comments of prosecution counsel were comparatively mild and restrained when compared to the belligerent utterances of prosecutors in many of the earlier cases considered in Chapters 2 and 3. The comments in *Livermore* may well have been inelegant. The personal expressions of opinion and the reference by prosecution counsel to the reaction of rape victims in Hollywood films were hardly the hallmarks of sound advocacy. As a

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<sup>98</sup> *Ibid* at 669 quoting *R v Subramaniam* (2004) 79 ALJR 1126 at 127-128.

<sup>99</sup> *Ibid* at 669.

<sup>100</sup> *Ibid* at 667. This was stated to be one of the five specific requirements of a prosecutor’s address. The others were to avoid a submission based on material that was not based on evidence, to refrain from inflammatory or intemperate comments tending to arouse prejudice or passion in the jury, not to attack the credit of a prosecution witness without allowing that witness an opportunity to respond to such an attack and conveying the prosecutor’s own personal opinions.

<sup>101</sup> (2006) 67 NSWLR 659 at 669.

<sup>102</sup> (2006) 67 NSWLR 659 at 669.

<sup>103</sup> *Ibid* at 671.

commentator in the *Sydney Morning Herald* noted, “No one disputes the Crown prosecutor should have chosen his words more carefully.”<sup>104</sup> But, I would suggest that this case falls a long way short of justifying the court’s denunciation of the prosecutor’s comments as representing “a serious departure from the standards of fairness required of a Crown prosecutor.”<sup>105</sup>

[4.5.8] Similar criticisms can be made of the decision of the New South Wales Court of Appeal in *R v MG*.<sup>106</sup> In this case the court took the unusual step of staying a retrial in a high profile rape case<sup>107</sup> until the original prosecutor, Margaret Cunneen, was replaced by new prosecution counsel on account of public comments that she had made during her delivery of the 2005 Sir Ninian Stephen Lecture.<sup>108</sup> The court concluded these comments demonstrated a lack of necessary prosecutorial detachment and objectivity.

[4.5.9] Ms. Cunneen had earlier attracted the ire of a court in *R v TS*<sup>109</sup> because of her brief comment to the press after the original trial of the accused in *MG* commending “the quality of the investigation and the fortitude of the victim.”<sup>110</sup> This “innocuous comment”<sup>111</sup> according to the court in *TS* was incompatible with the “unique role of the Crown Prosecutor in ensuring the machinery of criminal justice functions with a proper objectivity and impartiality.”<sup>112</sup> Ms. Cunneen had then compounded this error according to the court in *MG* by commenting on the case in the Sir Ninian Stephen Lecture. She had not only discussed the circumstances and convoluted history of *MG* at some length<sup>113</sup> (indicating her sympathy for the victim),<sup>114</sup> but had also raised various issues of general concern about the criminal justice system.<sup>115</sup> Cunneen had asked whether public confidence in the courts was being eroded by “the perception that the pendulum has

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<sup>104</sup> Devine, M, “Off with the cuffs of limitation,” *Sydney Morning Herald*, 2 November 2006.

<sup>105</sup> (2006) 67 NSWLR 659 at 668.

<sup>106</sup> (2007) 69 NSWLR 20.

<sup>107</sup> The retrial arose from one of a series of brutal rapes perpetrated by a gang led by the notorious Bilal Skaf.

<sup>108</sup> See further Ch 1, n 13.

<sup>109</sup> [2004] NSWCCA 38 at [3] and [113].

<sup>110</sup> *Ibid* at [113].

<sup>111</sup> Rapke, above n 59, 24. Rapke speculated at the implausibility of an American prosecutor being admonished for expressing such a comment.

<sup>112</sup> *R v TS* [2004] NSWCCA 38 at [3] per Sully J. The other members of the court expressly agreed with Sully J on this point at [113].

<sup>113</sup> The case had a lengthy history over several years with various appeals by both sides.

<sup>114</sup> The victim had not only been raped on 25 occasions by 14 different assailants but her ordeal had been exacerbated by her treatment in a criminal process that had lasted for several years. Her detailed cross-examination in one trial had included such questions as whether she had been moaning in pleasure when she had testified that she had been screaming for help and whether she was Australian (she was Aboriginal). To add to the victim’s ordeal the defence even gained access by court order to her private counselling records which led the victim to refuse to attend any medical practitioner or health worker again for fear that such private records would end up in the hands of the accused and their lawyers and be used against her (on this point see further the discussion in Part 10 of Chapter 6 at [6.10.7]-[6.10.8]). See further Fife-Yeomans, J, “Rape Victims Last Straw,” *Daily Telegraph*, 22 May 2007.

<sup>115</sup> Cunneen had raised various issues including the plight of victims within the criminal process, the disadvantages of the adversarial system and the granting of retrials on “technical” or insignificant grounds.

swung too far in the protection of the rights of accused persons.”<sup>116</sup> She had attacked the combative approach adopted by some defence lawyers in her view and suggested that there seemed to be “a fashion among some in the criminal justice system for a kind of misplaced altruism that it is somehow a noble thing to assist a criminal to evade conviction.”<sup>117</sup> Cunneen had declared that justice wasn’t achieved by “ambush, trickery, dragging proceedings out in a war of attrition with witnesses” but was rather achieved by “honesty, balance and proportion.”<sup>118</sup>

[4.5.10] The court in *MG* applied cases such as *Whitehorn* and *Livermore* in criticising Cunneen’s comments, both in general and specifically in relation to the facts and history of the present case. According to the court, her comments revealed that she would be unable to approach the retrial with the fairness and detachment expected of prosecution counsel as a minister of justice. The court was particularly concerned by the fact that Cunneen had publicly expressed her apparent view as to the guilt of the accused. Such expressions according to the court were fundamentally at variance with the prosecutor’s proper role:

The statements which Ms Cunneen made have a number of consequences. They demonstrate a lack of detachment from the case she was required to prosecute. There is no difficulty in Ms Cunneen privately holding the view that the applicant is guilty. However her public expression of that view displayed partiality and potentially compromised her capacity to fairly prosecute on behalf of the Crown. It had the consequence that a fair minded person might reasonably conclude that her conduct of the prosecution would be directed to vindicating her publicly expressed view. When a prosecutor on a public occasion expresses the view that a person is guilty, although they have not been tried according to the law, the later prosecution of that person by that prosecutor tends towards oppression which is the antithesis of a fair trial.<sup>119</sup>

[4.5.11] Accordingly in the “unusual”<sup>120</sup> circumstances of the present case it was held to be appropriate to stay the retrial until a different prosecutor could be appointed in place of Ms. Cunneen.

[4.5.12] This decision proved controversial. Jeremy Rapke QC, the Director of Public Prosecutions of Victoria has described it as “thoroughly unsatisfactory.”<sup>121</sup> Rapke compared the approach in *MG* with the differing approach adopted by Harper J in *Grimwade v Victoria*<sup>122</sup> which he asserted represented “a more robust, and perhaps,

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<sup>116</sup> (2007) 69 NSWLR 20 at 27.

<sup>117</sup> *Ibid* at 28. This comment proved especially controversial. One defence lawyer even labelled Cunneen a “disgrace to our profession,” see Gibbs, S, “Prosecutor called to account for attack on defenders,” *Sydney Morning Herald*, 26 September 2005.

<sup>118</sup> (2007) 69 NSWLR 20 at 27-28. Though Cunneen’s comments were contentious, the cases listed above in n 46 and the references listed below in nn 309-315, offer some support for her argument. See further the discussion in Part 11 of this Chapter.

<sup>119</sup> (2007) 69 NSWLR 20 at 46.

<sup>120</sup> (2007) 69 NSWLR 20 at 47.

<sup>121</sup> Rapke, above n 59, 28.

<sup>122</sup> (1997) 90 A Crim R 526 at 538-539.

realistic view of these matters.”<sup>123</sup> A commentator in *The Australian* argued that the decision in *MG* illustrated the “prescience”<sup>124</sup> of Cunneen’s remarks that the pendulum had swung too far against the prosecution. It raised the worrying spectre of the defence challenging the choice of prosecution counsel and seeking the prosecutor’s removal if there was the perception that he or she might not discharge his or her obligations with appropriate fairness and detachment. The commentator asked:

However, what would constitute such bias? In Cunneen’s case it was the speech she had delivered at Newcastle... The only implication here is that Cunneen, in the mind of the Court of Appeal, had a predisposition towards the guilt of *MG* that would impede her ability to impartially discharge her duties. This is a direct challenge to Cunneen’s professional competence; more broadly it allows the integrity of all prosecutors to be questioned. It must be assumed every prosecutor forms a personal view of the guilt or otherwise of an accused. However, a necessary intellectual detachment – not to mention the presiding judge – prevents prosecutors from presenting facts to a jury in anything but a fair manner... This further illustrates the enormity of the appeal court decision. Whichever way it is examined the Court of Appeal decision defies logic. It swings the balance further towards the accused, gives overzealous defence teams another weapon that can be used to disrupt prosecutions and, in some cases, intimidate witnesses.<sup>125</sup>

[4.5.13] The court’s view of the prosecutorial role in *MG* is overly confined and unrealistic. It is arguable that Cunneen in her address had raised issues of legitimate public concern.<sup>126</sup> Whilst some of Cunneen’s comments in relation to *MG* may have been “ill advised,”<sup>127</sup> especially as a retrial was pending, that is not the same as finding she lacked the capacity to conduct the prosecution case properly. In particular, the notion that any public expression by the prosecutor of his or her effective belief in the accused’s guilt, as opposed to the holding of such a belief in private, should disqualify that prosecutor from thereafter acting in that case on account of purportedly lacking professional detachment and having discarded his or her proper role would seem to take the minister of justice doctrine to an unrealistic level. It has never been said that the prosecutor should be free of partisanship or bias in the same way as should a juror or judge.<sup>128</sup>

[4.5.14] *MG* should be contrasted with the more nuanced view taken by the Ontario Court of Appeal in *R v Elliott*<sup>129</sup> where the public expression<sup>130</sup> by prosecution counsel of his belief in the defendant’s guilt in the absence of the jury was held not to breach the

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<sup>123</sup> Rapke, above n 59, 28.

<sup>124</sup> Moore, I, “Court frets about the rapist, not his victim,” *The Australian*, 23 April 2007.

<sup>125</sup> *Ibid.*

<sup>126</sup> Even the court in *MG* accepted that it was appropriate for Cunneen to have raised the ordeal of the victim, possible reforms to the criminal justice process and the merits of the inquisitorial over the adversarial system.

<sup>127</sup> Moore, above n 124. Cunneen had also breached the NSW *Bar Rules* and the NSW DPP *Professional Guidelines* by commenting in public on the facts of *MG*. Though the Legal Services Commissioner had dismissed a complaint against for Cunneen for breaching these rules as “technical” the Court of Appeal did not share this opinion, see (2007) 69 NSWLR 20 at 37. See further Gibbs, above n 117.

<sup>128</sup> See *R v Karounos* (1995) 63 SASR 451 at 465-466 per King CJ.

<sup>129</sup> [2003] OJ 4694.

<sup>130</sup> This was in response to “provocative and intemperate” remarks of defence counsel [2003] OJ 4694 at [152].

prosecutor’s duty. There was no evidence (as was also the situation in *MG*) that such a belief had improperly influenced any prosecution decision.<sup>131</sup> The Ontario Court of Appeal acknowledged that prosecution counsel must act with objectivity but an honest and reasonable belief by counsel in the guilt of the accused was not inconsistent with the prosecutor’s duty of fairness.<sup>132</sup>

[4.5.15] The prosecutor does have a legitimate and indispensable role in an adversarial criminal system to seek the conviction of the accused.<sup>133</sup> The notion expressed in *MG* that a private belief by a prosecutor of a defendant’s guilt is acceptable and consistent with a capacity to prosecute fairly and objectively a case but the public expression outside court of that belief is unacceptable and inconsistent with a capacity to prosecute fairly and objectively is not only far fetched, but offensive to the professional integrity of the prosecutor involved and the trial judge’s ability to ensure the fairness of the proceedings.<sup>134</sup>

[4.5.16] *Livermore* and *MG* confirm the long line of authority starting with *Thursfield* that the prosecutor’s function is to be performed without any concern whether the case is won or lost and that the sole object of the prosecutor is to expose the truth, “which may or may not result in a conviction.” However, it is arguable that the New South Wales Court of Appeal in *MG* and in *Livermore* applied too stringent an approach, especially on the particular facts of those cases, in finding that the prosecutors had departed from this standard. I would suggest that while emphasising the minister of justice dimensions of the prosecutor’s role in the criminal process, the court in both *Livermore* and *MG* failed to recognise the undoubted adversarial role that the prosecutor must perform.

[4.5.17] I would also suggest that, with respect to the court’s judgment in *Livermore*, it was legitimate for the prosecutor in to have questioned aspects of Mick’s evidence and his initial reaction. If the prosecution were to present the case to the jury as one of rape it is difficult to see how they could have done otherwise. Similarly, surely it is legitimate in an adversarial system, especially in a case where the defendant has chosen not to answer questions or give evidence, for the prosecution to attack vigorously and impugn the defence case that the victim had consented. The court’s assertion that the prosecutor’s

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<sup>131</sup> [2003] OJ 4694 at [149].

<sup>132</sup> [2003] OJ 4694 at [149].

<sup>133</sup> See further the discussion in Part 7 of this Chapter.

<sup>134</sup> Both Cunneen’s conduct and the court’s judgment in *MG* should also be contrasted with the role of prosecution counsel, Joyce Dudley, and the decision of the Supreme Court of California in *Haraguchi v Superior Court* (No S148207, 12 May 2008). An Appeals Court had barred Dudley from playing any further part in the prosecution of a rape case after finding that she had a financial and emotional interest in the case that precluded her continued objective involvement. The Appeals Court found Dudley had written and published a novel (of very low circulation) inspired or loosely based on the case that portrayed a “biased black and white view of the participants in the criminal justice system.” While the accused and his lawyer were shown in an unflattering light prosecutors were depicted as “fearless champions of truth and justice.” The heroine prosecutor of the novel was, to use Dudley’s own words, a “pumped up version” of herself. The Supreme Court, nevertheless, unanimously reversed the Appeal Court’s ruling. The Supreme Court, without necessarily encouraging literary efforts by practising lawyers, rejected the proposition that Dudley’s novel or her apparent (assuming the novel reflected them) personal views about the criminal justice system precluded her fair and even-handed conduct of the prosecution of the case. The Supreme Court in *Haraguchi* arguably demonstrated a more realistic and sophisticated understanding of the prosecutorial role than the court in *MG*.

criticisms of the defence case amounted to an impermissible effort to “ridicule and belittle” the defence case is questionable. The obvious retort must be that in an adversarial forum that is the proper function of the prosecution where it is seeking to establish the guilt of the accused? In any event, as was recognised by the Privy Council in *Bendetto*, the prosecutor is entitled to speak to the jury in a “robust” language and style that they can understand and relate to.<sup>135</sup> Can it not be argued that that is what the prosecutor in *Livermore* did? Is not “belittle and ridicule” effectively the same as vigorous adversarial advocacy and is this not this prosecutor’s function at trial? The court’s conception in *Livermore* of the acceptable boundaries of the prosecutorial role potentially consigns prosecution counsel to the category of supine “Casper Minqueot prosecutors.”<sup>136</sup>

[4.5.18] Might not *Livermore* and *MG* be regarded as cases that take the minister of justice doctrine “too far”; decisions that fail to reflect the practical reality of the prosecutor’s role in an adversarial process? The prosecutor’s duty may well be to seek justice. Yet, as Gourlie notes, “the ends of justice often demand a firm adversarial stance.”<sup>137</sup> As one commentator in the *Sydney Morning Herald* noted in relation to *Livermore*:

Prosecutors have an equal obligation to ensure fairness is done in a criminal trial towards the victim, the victim’s loved ones and the community. While it is wrong for the innocent to be found guilty, it is equally wrong for the guilty to go unpunished.<sup>138</sup>

[4.5.19] Some commentators such as Taylor and Byrne,<sup>139</sup> Shapray,<sup>140</sup> Zellick,<sup>141</sup> Grosman,<sup>142</sup> Frank,<sup>143</sup> Uviller<sup>144</sup> and Grossman<sup>145</sup> have also questioned the assumption that the prosecutor can, or should, act always as a minister of justice. Such criticisms of the minister of justice concept, whilst comparatively rare, are apposite. Zellick, for example, is unimpressed with the predictions of dire consequences should the prosecutor ever depart from this role:

These dangers, however, are much exaggerated. Much nonsense is apt to be talked about prosecuting counsel’s being a minister of justice. The fact remains that he is there to secure a conviction, even if there are limits on the lengths to which he may go to obtain it... No accused is likely to regard counsel for the Crown as an impartial administrator of justice, and of course he is not.<sup>146</sup>

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<sup>135</sup> *R v Bendetto & Labrador* [2003] 1 WLR 1545 at 1566.

<sup>136</sup> Turner, Ch 2, n 22, 452.

<sup>137</sup> Gourlie, Ch 1, n 211, 297.

<sup>138</sup> Devine, above n 104.

<sup>139</sup> Taylor and Byrne, above n 2, 329-330.

<sup>140</sup> Shapray, Ch 1, n 21, 297.

<sup>141</sup> Zellick, Ch 2, n 31, 499.

<sup>142</sup> Grosman, Ch 2, n 303, 86.

<sup>143</sup> See Frank and Frank, above n 18, 231-242.

<sup>144</sup> Uviller, above n 9.

<sup>145</sup> Grossman, Ch 1, n 249, 346.

<sup>146</sup> Zellick, Ch 2, n 31, 499. Though Zellick’s comments were in relation to the prosecutor’s contribution at the sentencing stage, I would suggest that, in the present context, they are of general application.



## **Part 6: The Modern Prosecutor: Is the Minister of Justice Role Still Appropriate? Two Important Issues**

[4.6.1] The adherence in both England and Australia to the notion of the prosecutor as a minister of justice tends to obscure certain crucial questions. Two fundamental issues are raised by the continued application in a contemporary context of the prosecutor’s role as a minister of justice. First, there is the issue of how in an adversarial process the prosecuting lawyer is able to discharge concurrently the seemingly conflicting obligations of both an impartial minister of justice and an active adversarial advocate?<sup>147</sup> The concept of the quasi-judicial minister of justice prosecutorial role is one that is not easily accommodated within an adversarial framework.<sup>148</sup> Secondly, there is the issue of whether a prosecutorial role that emerged, as was seen from Chapter 2, within the particular framework of nineteenth century English criminal practice and procedure still retains resonance and relevance in the vastly changed circumstances of contemporary criminal procedure in both Australia and England. Should the role of the prosecutor of the 21<sup>st</sup> century continue to be governed by a model that emerged almost two centuries ago in a very different legal climate?

[4.6.2] Accordingly it may be appropriate to question the largely unchallenged assumption that the role of the modern prosecutor should remain that of a minister of justice. It may be timely, given the stringency of the courts’ approach in *Livermore* and *MG*, to re-evaluate the role of the modern prosecutor. It may be preferable for that role to be formulated so that it more realistically reflects his or her position within a modern adversarial criminal justice framework, one that is not hostage to a concept that developed in the particular circumstances of early nineteenth century English criminal procedure and practice.

## **Part 7: “The State too is entitled to a fair trial”: The Minister of Justice Role Qualified?**

[4.7.1] Many judicial decisions have recognised, despite the New South Wales Court of Appeal apparently discounting its significance in *Livermore* and *MG*, that there are sound reasons why the prosecutor’s role as a “pure” minister of justice must be qualified to the extent that is necessary to accommodate the unavoidable fact that within an adversarial system the prosecutor must retain the ability and freedom to act as an active advocate to seek the conviction of the accused. It has long been recognised that both the state and the community have a legitimate interest in the outcome of the criminal process. One of the basic duties of the state is to prevent crime and protect the safety and property of its citizens.<sup>149</sup> No-one can dispute the blight that crime can, and all too often does, place on the community.

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<sup>147</sup> See, for example, Medwed, D, “The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence” (2004) 84 BUL Rev 125 at 138-139.

<sup>148</sup> See, for example, Grosman, Ch 2, n 303, 86.

<sup>149</sup> See *R v Mulvahill* (1992) 69 CCC (3d) 1 at 8 per Southin JA. See also Flint, D, “Keep the peace: learn from Giuliani’s tactics,” *The Australian*, 26 November 2008.

[4.7.2] Given that both the state and the community have a proper interest in the outcome of the criminal process, the interests of justice are understandably not solely confined to a consideration of the interests of the accused. Lord Simon LC in 1944 observed that “it is true that a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the accused.”<sup>150</sup> Lord Goddard CJ in 1946 echoed this sentiment, “The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.”<sup>151</sup> This sentiment was adopted in *R v Thomas (No 2)*<sup>152</sup> by the New Zealand Court of Appeal which noted that the interests of the community should not be overlooked and that the prosecuting lawyer was “fully entitled, and indeed obliged to be as firm as the circumstances warrant.”<sup>153</sup> Lord Steyn in England in *Attorney-General’s Reference (No 3 of 1999)*<sup>154</sup> also highlighted the various interests at stake in criminal proceedings and the need for the criminal process to pay regard to a “triangulation” of interests; which include not just the interests of the accused but also the interests of the community and the victim. His Lordship observed:

It must be borne in mind that respect for the privacy of the defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.<sup>155</sup>

[4.7.3] It must therefore be remembered, as suggested by the commentator of the *Sydney Morning Herald* in her criticism of *Livermore*, that the prosecutor fulfils a vital public function on behalf of the state, the community and the victim and properly acts in the criminal process on their behalf. “Victims of crime and the public have an interest in prosecutions going on.”<sup>156</sup> This view has also been advanced in Australia. As the New South Wales Court of Appeal in 1979 in *Moss v Brown*<sup>157</sup> observed:

In any discussion of fairness, it is imperative to consider the position of all parties. It is sometimes forgotten that the Crown has rights and, it has a heavy responsibility in respect of the invoking and enforcement of the criminal law...it is entitled to maintain those rights even if they may bear heavily on some accused.<sup>158</sup>

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<sup>150</sup> *R v Stirland* [1944] AC 315 at 324.

<sup>151</sup> *R v Grondkowski & Malinowski* [1946] KB 369 at 372.

<sup>152</sup> [1974] 1 NZLR 658.

<sup>153</sup> [1974] 1 NZLR 658 at 659.

<sup>154</sup> [2001] 2 AC 91.

<sup>155</sup> [2001] 2 AC 91 at 118. It is also notable that in jurisprudence on the *European Convention of Human Rights* the rights of the accused are not absolute or the sole concern and that the rights and interests of victims and witnesses are significant and cannot be ignored, see *Doorsen v Netherlands* (1996) 22 EHRR 330.

<sup>156</sup> *R v Heston-Francois* [1984] 1 All ER 785 at 792.

<sup>157</sup> [1979] 1 NSWLR 114.

<sup>158</sup> [1979] 1 NSWLR 114 at 126. See also Badgery-Parker, J, “The Criminal Process in Transition: Balancing Principle and Pragmatism – Part 1” (1994-1995) 4 Jour Jud Admin 171 at 172.

[4.7.4] There is an obvious risk that this vital function may not be effectively discharged if the prosecutor should adopt too passive or supine a role in the criminal justice process. If the prosecutor should fail effectively to prosecute and act as little more than a disinterested bystander then the whole adversarial system of criminal justice encounters serious difficulties in both theory and practice. Sir Patrick Devlin commented on the “lamentable” consequences of such a development:

Finally there is, or has been, a tendency for counsel for the prosecution not to prosecute firmly enough. The last half-century has seen a welcome transition in the role of prosecuting counsel from a prosecuting advocate into a ‘minister of justice’. But in some places the pendulum has swung too far, and the ministry has moved so close to the opposition, that the prosecutor’s case is not adequately presented, and counsel, frightened of being accused of an excess of fervour, tend to do little except talk of reasonable doubt and leave the final speech on the facts to the judge. In England the administration of justice depends as much on the presentation of two opposing cases as government in England depends on the two party system. The result of that deficiency is that the duty of seeing that the prosecution’s case is effectively put is sometimes transferred to the judge and thus the balance of the trial is upset.<sup>159</sup>

[4.7.5] There have been many illustrations of prosecutors, perhaps, applying the minister of justice role too literally and liberally and failing to prosecute effectively, if at all, either individual cases<sup>160</sup> or, even, in whole categories of cases.<sup>161</sup> The traditional failure to prosecute effectively cases of domestic violence is well known.<sup>162</sup> Similarly, throughout the common law world the prosecution of rape cases has been strongly criticised.<sup>163</sup> As

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<sup>159</sup> Devlin, P, *Trial by Jury* (2<sup>nd</sup> ed) (London, University Paperback, 1966) p 122-123.

<sup>160</sup> See, for example, *R v DPP, ex parte C* [1995] 1 Cr App R 136; Dyer, C, “Making a Pact with the Devil,” *The Guardian*, 30 October 2000, p 14 (describing how prosecution counsel had avoided a trial and been a party to a “lamentable” agreement that had allowed a child sex offender to escape a deserved prison sentence). See further *R v Peverett* [2001] Crim LR 60 and the *Attorney-General Guidelines on the Acceptance of Pleas* in 2001 which were prompted by the case. See also Eisenhammer, J & Willcox, J, “How the Levitt Deal was Hammered Out,” *The Independent*, 30 May 1995, p 4 (describing the uproar caused by the prosecution accepting a “deal” for an alleged “conman” to plead guilty to only one minor offence out of 62 arising from a multi-million pound business collapse and as part of that deal enabling the accused to avoid any term of imprisonment). See further Eisenhammer, J, Lyell Misled Commons over Levitt deal,” *The Independent*, 30 May 1995, p 1 and Eisenhammer, “Lyell faces new Levitt case row,” *The Independent*, 5 June 1995, p 5. The controversy over the comments of prosecution counsel in late 2007 in Aurukun in Queensland during the sentencing of several Aboriginal defendants for the rape of a young girl provide a recent illustration. The prosecutor was widely criticised for adopting such a lenient, if not indulgent, approach to the case that he not only failed to protect the welfare of the victim, but also failed to convey the gravity of the offence and effectively spared the defence the task of having to make a speech in mitigation. See Marriner, C, “Prosecutor in child rape case stood aside,” *Sydney Morning Herald*, 12 December 2007 and Mancuso, R, “Gang-rape Prosecutor stood aside,” *The Australian*, 11 December 2007. See further *R v KU & Others; ex parte A-G* [2008] QCA 20 and 154.

<sup>161</sup> Amongst the many issues associated with the prosecution of domestic violence and sexual assault, the historical lack of commitment with which prosecutors pursued both cases of domestic violence (see below n 162) or sexual assault (see below n 163) is well documented.

<sup>162</sup> See Cretney, A, and Davies, G, “Prosecuting ‘Domestic’ Assault” [1996] Crim LR 162 at 163. See also Cretney, A, and Davies, G, “Prosecuting Domestic Assault: Victims Failing Courts or Courts Failing Victims?” (1997) 36 Howard CJJ 146. Corsilles notes that by any standard American research “indicates a pervasive practice of [prosecutors] dismissing domestic abuse cases prior to trial,” Corsilles, A, “No Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution” (1994) Ford L Rev 853 at 854, n 7. See further *Ibid*, 854-855.

Temkin observes it is often said that such prosecutions are conducted “faithlessly” and that prosecution counsel remains passive in the face of aggressive defence tactics and fails to prevent victims from being “systematically trashed in court.”<sup>164</sup> There is a danger if prosecution counsel bends himself or herself double in trying to be fair to the accused that every valid point that could, and should, be made against the accused may not be put before the court.<sup>165</sup> The prosecution might neither win victories nor suffer defeats,<sup>166</sup> “but weaknesses in presenting the case for the prosecution can lead to injustice by allowing a guilty man to escape the proper consequences of his actions.”<sup>167</sup> Bull makes a similar point:

[The minister of justice of role] is not to say that the Crown must be supine in the performance of his duties...The adversary system is fundamental to the Anglo-American forensic process. Vigour is frequently demanded to see that the court is not misled – that the course of justice is not warped. [Prosecution] Counsel must not be hoodwinked by those who, while affecting to tell the truth are really twisting facts to help the prisoner, and he must assiduously cross-examine the witnesses for the defence to find out how far they can be relied upon. He must be alert stalwartly to oppose the counsel who allows his duty to his client to transcend his duty to his Court, to the State and to his conscience.

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[4.7.6] Accordingly, as will be argued below, there is a widespread, though perhaps not universal,<sup>169</sup> recognition that the role of the prosecutor must be flexible and sufficiently robust to accommodate the demands of prosecuting on behalf of the community in an adversarial criminal process.<sup>170</sup> There has been broad acceptance across the common law world that for an adversarial system of criminal justice to function as it is supposed to, it is necessary for the prosecutor to be at liberty to assume a robust, even “adversarial,” role in the proceedings. Humphreys observes that, even as a minister of justice, it is the duty of prosecution counsel to prosecute and he or she “need not rise to his [or her] feet and apologise for doing so. It is not unfair to prosecute, and the defence will look after the defence.”<sup>171</sup> Humphreys expressed his belief in blows that were “hard hitting” but “scrupulously fair.”<sup>172</sup> The Supreme Court of the United States in 1976 spoke of “the

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<sup>163</sup> See Temkin, J, “Prosecuting and Defending Rape Cases: Perspectives from the Bar” (2000) 27 Jour Law & Soc 230 at 240; Chambers, G, and Millar, A, *Prosecuting Sexual Assault* (Edinburgh, Scottish Office Central Research Unit, 1986) p 89, n 8; and Lees, S, *Carnal Knowledge: Rape on Trial* (London, Hamish Hamilton, 1996) p 253-254.

<sup>164</sup> Temkin, above n 163, 240. Temkin argues that a more assertive prosecutorial style would not be inconsistent with the prosecutor’s role as a representative of the state rather than as an agent of the victim. See *Ibid*.

<sup>165</sup> Du-Cann, R, *The Art of the Advocate* (Harmondsworth, Penguin Books, 1964) p 38.

<sup>166</sup> *Ibid*. See also the discussion in Parts 3 and 4(2) of Chapter 1 at [1.3.5] and [1.4.2.1].

<sup>167</sup> *Ibid*. Du-Cann cites a highly charged wartime trial in 1917 where prosecution counsel was too timid in cross-examination and the accused was acquitted as an example of such an “injustice.” See *Ibid*, 57-58. See also Savage, Ch 1, 178, 169.

<sup>168</sup> Bull, Ch 1, n 170, 96.

<sup>169</sup> Noting decisions such as *MG* and *Livermore*.

<sup>170</sup> The modern prosecutorial role must also pay regard to the welfare and safety of witnesses, see further above n 76 and the discussion in Part 11 of this Chapter at [4.11.3].

<sup>171</sup> Humphreys, Ch 1, n 1, 740-741.

<sup>172</sup> *Ibid*, 741.

vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice system.”<sup>173</sup> There is a need for a “proper balance” to be maintained in the criminal process and the prosecutor’s role as a minister of justice should not be assumed to such an extent that it emasculates the legitimate functions of the prosecuting lawyer.<sup>174</sup> A prosecutor is not only entitled, but is positively expected, albeit within certain important limits, to take both an active and a vigorous role in the criminal process. This theme has especially emerged in a line of Canadian decisions. In *R v Savion*,<sup>175</sup> Zuber JA of the Ontario Court of Appeal stated:

By reason of the nature of our adversary system of trial, a Crown prosecutor is an advocate: he is entitled to discharge his duties with industry, skill and vigour. Indeed, the public is entitled to expect excellence in a Crown Prosecutor, just as an accused person expects excellence in his counsel.<sup>176</sup>

[4.7.7] Similarly in *R v Cook*<sup>177</sup> L’Heureux-Dubé, J when delivering the unanimous judgment of the Supreme Court of Canada, held:

... it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence. It is well recognised that the adversarial process is an important part of our justice system and an accepted tool in our search for the truth. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate role to the best of its ability.<sup>178</sup>

[4.7.8] The fact that the prosecutorial role as a minister of justice should not stand in the way of the active and assertive approach that is often necessary in an adversarial system was also recognised in *R v Karaibrahimovic*<sup>179</sup> in 2002 by the Alberta Court of Appeal:

We recognise that Crown counsel are in a difficult role and we appreciate that Crown counsel ought not to be condemned for making the Crown’s case in a compelling manner...Therefore, the proposition that Crown counsel are limited to weak, timid and non-compelling advocacy without similar restrictions on defence counsel is not one we accept. While the Crown’s obligation is to seek the truth, not to win at any cost, the trial process, including closing addresses, remains an adversarial one. Thus, Crown counsel must have the freedom to pursue the Crown’s position in a convincing, dynamic and eloquent fashion, always recognising their special position in serving justice. *The state too is entitled to a fair trial* [my emphasis].<sup>180</sup>

[4.7.9] In Australia, Carruthers AJ of the New South Court of Appeal in 2001 has commented that while prosecutors are subject to “considerable constraints” in the

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<sup>173</sup> *Imbler v Patchman* (1976) 424 US 409 at 427-428.

<sup>174</sup> See *R v Roulston* [1976] 2 NZLR 644 at 654.

<sup>175</sup> (1980) 52 CCC (2d) 276.

<sup>176</sup> (1980) 52 CCC (2d) 276 at 289.

<sup>177</sup> (1997) 146 DLR (4<sup>th</sup>) 437.

<sup>178</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 446.

<sup>179</sup> (2002) 164 CCC (3d) 431.

<sup>180</sup> (2002) 164 CCC (3d) 431 at 449. See also *R v Daly* (1992) 57 OAC 70 at 76.

performance of their duties, it is, nevertheless, incumbent upon them to “discharge their obligations fearlessly in the interests of the Crown, acting on behalf of the community.”<sup>181</sup> In *R v Karounos*<sup>182</sup> in 1995 the Court of Appeal of South Australia rejected the “novel proposition”<sup>183</sup> that the prosecuting lawyer must be utterly impartial in his or her conduct of the prosecution case. King CJ stated:

The responsibilities of a judge or juror are different in kind from the responsibilities of prosecuting counsel. A criminal trial is an adversarial proceeding and prosecuting counsel is in an adversarial relationship with the accused. Prosecuting counsel is not expected to be free of partisanship in the same way as is a judge or juror. His partisanship should be tempered by his duty to act with fairness and detachment, to endeavour to establish the whole truth and to ensure that the trial is fair... Nevertheless counsel's duty is to present the case for one side, namely the prosecution, in the adversarial contest, not to adjudicate impartially upon the issues between the parties.<sup>184</sup>

[4.7.10] The High Court has also recognised the “duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person and to use strong terms.”<sup>185</sup> It must be borne in mind that an address to a jury is an effort to communicate with lay persons.<sup>186</sup> Robust or blunt advocacy may well be necessary and prosecution counsel at trial is not prohibited from the use in an address of colloquial expressions such as might be out of place in a formal judgment or a scholarly legal article.<sup>187</sup> In *R v Beydag*<sup>188</sup> the Court of Appeal of Victoria accepted that while the prosecutor would be well advised to avoid inflammatory rhetoric:

Of course, this does not mean that a prosecuting counsel should not present the Crown case firmly and vigorously or subject that advanced on behalf of the accused to proper scrutiny and criticism. Indeed, it is the responsibility of counsel to do so if a fair trial is to be conducted. It must not be forgotten that the concept of fairness is multi-faceted and involves not only the interests of the accused but also those of the wider community.<sup>189</sup>

[4.7.11] The Court of Appeal of Tasmania in *R v Lyons*<sup>190</sup> similarly accepted that there were perils in the prosecutor being overly constrained in the discharge of his or her functions. Wright J recognised that it was inappropriate to adopt a supine role:

Crown counsel is not obliged to pander to the idiosyncratic or hypercritical sensibilities of defence counsel. He is not required to reduce his rhetoric to dull and lifeless factual propositions. He should, of course, avoid hyperbolae and not seek to sway the jury by

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<sup>181</sup> *R v Rugari* (2001) 122 A Crim R 1 at 10.

<sup>182</sup> (1995) 63 SASR 451.

<sup>183</sup> (1995) 63 SASR 451 at 465.

<sup>184</sup> (1995) 63 SASR 451 at 465-466.

<sup>185</sup> *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 2000.

<sup>186</sup> *R v Attallah* [2005] NSWCCA 277 at [132] per James J.

<sup>187</sup> *R v Attallah* [2005] NSWCCA 277 at [133] per James J. See also *R v Karaibrahimovic* (2002) 164 CCC (3d) 431 at 450.

<sup>188</sup> Unreported, Court of Appeal of Victoria, 25 November 1996, No 150/1996.

<sup>189</sup> *Ibid.*

<sup>190</sup> (1992-1993) 64 A Crim R 101.

trickery, prejudice or emotion, but he should not be forced to weigh every word he utters for the potential disapproval it may attract in the Court of Appeal. Our system of criminal justice is adversarial. Crown counsel is an advocate, albeit that his role is special in that he should not fight for a conviction at all costs.<sup>191</sup>

[4.7.12]. The State too is entitled to fair trial and it is necessary that the prosecution lawyer is able to assume an active and robust role in the proceedings as befits his or her legitimate function in a modern adversarial criminal process. Justice is not served by “Casper Minqueot” prosecutors who are little more than a passive bystander or disinterested observer in the case.

## **Part 8: “This was not a Tea Party”: Practical Application of the Adversarial Role**

[4.8.1] The crucial adversarial qualification to the proposition that the prosecutor’s role is purely one as a minister of justice is illustrated by the decision of the Queensland Court of Appeal in *R v Day*.<sup>192</sup> *Day* may not represent new law but it is, nevertheless, a significant decision. The approach adopted in *Day* and its acknowledgement of the adversarial aspect of the prosecutorial role should be contrasted with the approach adopted in *Livermore* and *MG*.

[4.8.2] The defendant in *Day* had been convicted of the murder of a fellow prisoner as the apparent culmination of a course of violent and sexual bullying. The accused asserted that the death had been an accident. At trial the defendant had been subjected by prosecution counsel to an undeniably robust and searching cross-examination<sup>193</sup> that had included reference to his prior convictions for offences of both dishonesty and violence.<sup>194</sup> The cross-examination had included the prosecutor asking the defendant if he was “by nature a lying, conniving and a deceitful person,”<sup>195</sup> whether a prior account of his was “codswallop,”<sup>196</sup> if he was a man “not to be messed with” and “in gaol to be respected,”<sup>197</sup> whether he thought anything about the rights of a private person or depriving elderly people of their last meal,<sup>198</sup> about his involvement in the bullying of the deceased and, even, about engaging in sexual activity with another man during the trial.<sup>199</sup> The

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<sup>191</sup> (1992-1993) 64 A Crim R 101 at 104. See also *R v Roulston* [1976] 2 NZLR 644 at 654; *R v Deriz* (1999) 109 A Crim R 329 at 339; and *R v Causevic* [2008] NSWCCA 238 at [45]-[46].

<sup>192</sup> (2000) 115 A Crim R 80 at 86-87. See also *R v Deriz* (1999) 109 A Crim R 329 at 339.

<sup>193</sup> The cross-examination even yielded damning admissions by the accused as to his direct involvement in the murder. Contrary to the impression gained from the fictional legal world of Perry Mason and Horace Rumpole, this is a very rare event in practice.

<sup>194</sup> This was following counsel for the accused attacking the character of prosecution witnesses.

<sup>195</sup> (2000) 115 A Crim R 80 at 85.

<sup>196</sup> (2000) 115 A Crim R 80 at 85.

<sup>197</sup> (2000) 115 A Crim R 80 at 85.

<sup>198</sup> (2000) 115 A Crim R 80 at 85.

<sup>199</sup> (2000) 115 A Crim R 80 at 86. The accused had apparently performed an oral sexual act on a co-accused in the prison van during the trial. With respect to both the prosecutor and the court the relevance of this at trial is questionable.

prosecutor during his closing address categorised as “sub-moronic”<sup>200</sup> the “accident” defence and observed that the accused had looked into the face and eyes of the deceased as the deceased had seen his death coming.<sup>201</sup> The defence unsurprisingly complained that both the prosecutor’s cross-examination and closing address had been “inflammatory” and had occasioned a miscarriage of justice.<sup>202</sup>

[4.8.3] This criticism was rejected by the Court of Appeal<sup>203</sup> Several of the prosecutor’s comments were inapt according to Thomas JA but “overall,” prosecution counsel was held to be commended for his “well structured, relevant, commendably concise and effective” cross-examination.<sup>204</sup> The various impugned passages of the prosecutor in both cross-examination and closing address were found to be largely justified. His Honour commented that spontaneity is a valuable asset in criminal trials, even if it might lead to the occasional rhetorical flourish that might have been deleted on more mature reflection. While prosecution counsel should avoid inflammatory or emotive conduct that is calculated to prejudice the accused or distract the jury, especially in cases of child sexual abuse, it is important to appreciate that public policy demanded that counsel’s freedom of speech should not be lightly curtailed.<sup>205</sup> Thomas JA observed:

...it would be absurd to hold that advocates, whether for Crown or defence, are prohibited from appealing to the emotions or that they must perform their work without any passion, and without reference to human emotion...criminal trials deal with human situations and it is the duty of counsel to elicit answers which will give the jury appropriate insights into the conduct which will facilitate the drawing of inferences on issues such as motive, intention, knowledge and state of mind various actors. It is counsel’s duty to do so, and try to do so persuasively. The statements made in the ...cases condemning inflammatory and emotive conduct by counsel are not in my view intended to deny counsel their proper role in these respects.<sup>206</sup>

[4.8.4] A similar view was adopted in the Canadian case of *R v Clark*.<sup>207</sup> In this case the accused appealed his conviction for murder following a keenly contested trial on account of the purported excesses of prosecution counsel in both cross-examining the accused and her closing address. The Ontario Court of Appeal stated that such complaints should not be lightly advanced and dismissed the appeal:

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<sup>200</sup> (2000) 115 A Crim R 80 at 87.

<sup>201</sup> (2000) 115 A Crim R 80 at 87.

<sup>202</sup> (2000) 115 A Crim R 80 at 83.

<sup>203</sup> Thomas JA delivered the principal judgment. Pincus JA agreed and Davies JA “generally” ((2000) 115 A Crim R 80 at 81) agreed. Davies JA did note his reservation in relation to both the prosecutor’s cross-examination and closing address and categorised both as “close to the margin of proper conduct” (2000) 115 A Crim R 80 at 82.

<sup>204</sup> (2000) 115 A Crim R 80 at 87.

<sup>205</sup> (2000) 115 A Crim R 80 at 86 following *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 200.

<sup>206</sup> (2000) 115 A Crim R 80 at 86. However, sensitive cases such as those involving allegations of child sexual abuse as in *R v M* [1981] 2 Qd R 68 illustrate a qualification to this proposition and in such cases it is incumbent for prosecution counsel to act with conspicuous restraint and not to appeal to passion or prejudice. See further the earlier discussion at [6.4.3].

<sup>207</sup> [2004] OJ No 195.



*This was not a tea party* [my emphasis]. It was hard-fought murder trial and both sides were entitled to press their case and put their best foot forward. Crown counsel here did just that. Her cross-examination was firm and relentless but fair... The same holds for the closing address. It was lengthy, hard hitting and it left no stone unturned. It was not, however, unfair or inflammatory.<sup>208</sup>

[4.8.5] It is instructive to contrast *Clark* and *Day* with *Livermore* and *MG*. The prosecutor’s comments in *Day* exceeded those in *Livermore*. While it can be unhelpful to compare the facts of one case with those of another, *Day* and *Livermore* do not stand easily together. If *Livermore* is an example of the court perhaps emphasising the minister of justice dimensions at the expense of the prosecutor’s undoubted active role in an adversarial process, then *Day* and *Clark* confirm the crucial fact that the prosecutor’s role as a minister of justice is not unqualified. The prosecutor is expected, to act as an “advocate” and to adopt an active and adversarial role in the criminal trial. A criminal trial is not a “tea party.” But how does the prosecutor’s role as a minister of justice accommodate this? I would suggest that the qualification to the prosecutor’s role as a minister of justice doesn’t resolve the crucial tension referred to above. In fact, the judicial acknowledgement of the prosecutor’s duty to act as a vigorous advocate may exacerbate the already powerful tension in the prosecutor’s dual roles within an adversarial system of both minister of justice and active advocate.

### **Part 9: The Prosecutor as both Adversarial Advocate and Minister of Justice: Irreconcilable Differences?**

[4.9.1] The Court of Appeal of Tasmania in *R v McCullough* explained that “the observance of those canons of conduct” arising from the prosecutor’s role as a minister of justice are “not incompatible with the adoption of the advocate’s role.”<sup>209</sup> However, even though the modern prosecutor acts within an adversarial process, the court in *McCullough* reminded all prosecutors that they must “bear constantly in mind that his [or her] primary function is to aid in the attainment of justice, not the securing of convictions.”<sup>210</sup>

[4.9.2] For prosecution counsel to act as an active advocate in an adversarial system whilst still recognising that his or her ultimate role is one of a minister of justice can prove to be, as was acknowledged by the Court of Appeal of Victoria in *R v Parsons and Stocker*,<sup>211</sup> a difficult, if not frustrating, balancing act. The role of the advocate is also constrained by the rules of evidence and procedure that are designed to ensure a fair trial and protect basic rights and that consequently tend to impose limits upon the prosecution rather than the defence.<sup>212</sup> Nevertheless, despite such pressures the minister of justice role remains paramount.<sup>213</sup>

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<sup>208</sup> [2004] OJ No 195 at [122]-[123].

<sup>209</sup> [1982] Tas R 43 at 57.

<sup>210</sup> [1982] Tas R 43 at 57. See also *R v MacCreed* [2003] WASCA 275 at [33].

<sup>211</sup> (2004) 145 A Crim R 519.

<sup>212</sup> (2004) 145 A Crim R 519 at 543.

<sup>213</sup> [2004] VSCA 92 at [109].

[4.9.3] It is plain that to successfully navigate the narrow path between “indifferent bureaucrat” and “vengeful zealot” is so no simple task. To act as both a minister of justice and an adversarial advocate with a legitimate interest in advancing the Crown case inevitably requires some deft handling on the part of the prosecutor. McGoey describes that “reconciling these sometimes competing aspects of the role of Crown Counsel offers both personal and professional challenges.”<sup>214</sup> This begs the question whether, ultimately, the tension in prosecutorial roles is capable of being reconciled.

[4.9.4] Opinion on this issue is divided. On the one hand commentators such as Gourlie, Brooks and Turner have asserted that the tension is reconcilable.<sup>215</sup> Gourlie accepts that while questions do arise as to the extent to which the prosecution lawyer could conduct criminal proceedings as a “fair minister of justice without undermining the adversary process upon which our legal system is firmly based,”<sup>216</sup> the prosecutor’s paramount responsibility remains one of a minister of justice and, ultimately, the roles of ministers of justice and active advocate in an adversarial process are reconcilable. Brooks asserts to reconcile the prosecutor’s “quasi-judicial” and adversarial roles “is not some impossible or theoretical ideal.”<sup>217</sup> Brooks argues that prosecution counsel is not reduced to a “robot devoid of emotion” and if prosecution counsel whilst acting as an adversarial advocate exercises proper professional judgement and discretion by putting the concepts of justice and fairness over personal and other considerations, then the prosecutor’s ethical obligations arising from his or her position as a minister of justice “will be easily fulfilled.”<sup>218</sup> Turner similarly contends that the prosecutor’s position as a minister of justice in an adversarial system does not result in “Casper Minqueot prosecutors.”<sup>219</sup> Turner argues that as it is not the aim of prosecution counsel to obtain convictions (as the prosecutorial role as only to expose the truth)<sup>220</sup> the adversarial system has no application to his or her work. Justice is secured whatever the outcome of the case. “In the truest sense of the term, the Crown never wins or loses a criminal case...technically, really or otherwise.”<sup>221</sup>

[4.9.5] On the other hand, other commentators, notably Shapray,<sup>222</sup> Grosman,<sup>223</sup> Grossman<sup>224</sup> and Uviller<sup>225</sup> do not share this confidence. Grosman argues that the

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<sup>214</sup> McGoey, Ch 1, n 4, D 4-1.

<sup>215</sup> See also above n 16.

<sup>216</sup> Gourlie, Ch 1, n 211, 298. Gourlie asserts that the dual prosecutorial roles are consistent but acknowledges the great disparity in what is asked by each, see *Ibid*, 297-298.

<sup>217</sup> Brooks, Ch 1, n 6, 236-237.

<sup>218</sup> *Ibid*, 237.

<sup>219</sup> Turner, Ch 2, n 22, 452.

<sup>220</sup> See, for example, Humphreys, Ch 1, n 1, 740-741 and 748, *R v Boucher* [1955] SCR 16 at 23-24 and *R v Livermore* (2006) 67 NSWLR 659 at 669. See also the discussion in Part 3 of Chapter 1.

<sup>221</sup> Turner, Ch 2, n 22, 452. See also the discussions in Parts 3 and 4(1) of Chapter 1 at [1.3.5] and [1.4.1.1].

<sup>222</sup> See Shapray, Ch 1, n 21, 125-128.

<sup>223</sup> See Grosman, Ch 2, n 303, 86.

<sup>224</sup> See Grossman, Ch 1, n 249, 348-349.

<sup>225</sup> See Uviller, above n 9, 1713-1714 and 1718.

adversarial nature of criminal practice brings out the combative instincts in the opposing lawyers.<sup>226</sup> Shapray asserts that any notion of the prosecutor’s role in a criminal trial as detached or quasi-judicial is not credible or realistic and that one “need not develop a cynic’s view of human nature” to subscribe to this view.<sup>227</sup> Instead, he offers as “a more realistic appraisal of what actually transpires at trial”<sup>228</sup> the view of the prosecutor suggested by Judge Botein:

During the trial the accused is opposed by a prosecutor who is obliged by oath and impelled by persuasion or ambition or vanity or adversary ardour to use all the skill and resources at his disposal to convict. When a criminal case reaches the point of trial, the prosecutor is then the advocate for the community seeking to bring the criminal to justice, with all the psychological spur and stimulus of an attorney in an adversary proceeding.<sup>229</sup>

[4.9.6] Given this “psychological spur,” given the contest that the trial actually is, it is questionable whether it is either practical or realistic to ask a prosecutor, especially during a criminal trial, to function purely as a minister of justice and to be oblivious to external considerations or the outcome of a case. There are systematic and other<sup>230</sup> pressures on prosecutors. As was noted by MacFarlane:

That [the minister of justice role] is the theory. The practice is often different. Consider, for example, the heavy pressures placed upon Crown counsel as a means of securing career advancement. ‘The most idealistic prosecutor would have few illusions about his future prospects if every person he prosecuted were to be acquitted. This is, perhaps, rarely taken into account at a conscious level but it adds to the overall ethos of rivalry and hence the need to win.’ A special strength of character is required if Crown counsel is to resist getting caught up in a ‘culture of winning’.<sup>231</sup>

[4.9.7] For all the rhetoric of the prosecutor as a minister of justice it is legitimate to ask whether the stark realities of modern prosecution practice in an adversarial process readily accommodate the notion of the prosecutor as a detached minister of justice with no interest in either the outcome of a case or the potential impact of it upon his or her career prospects. As early as 1932 Borchard suggested that the experience in the United States was such that it was “common knowledge that the prosecuting technique in the

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<sup>226</sup> Grosman, Ch 2, n 303, 86.

<sup>227</sup> Shapray, Ch 1, n 21, 127.

<sup>228</sup> *Ibid.*

<sup>229</sup> Botein, B, and Gordon, M, *The Trial of the Future: Challenge to the Law* (New York, Simon Schuster, 1963) p 71 quoted at Shapray, Ch 1, n 21, 127, n 1.

<sup>230</sup> The effect of “tunnel vision” has been raised as also detracting from the minister of justice role, see Burke, Ch 1, n 48, 494-496 and Melilli, Ch 1, n 12, 686-691. There is a view that the longer a person prosecutes the more likely it is that he or she will succumb to partisanship and “tunnel vision” and fall into the “them and us” way of thinking that allegedly categorises the attitude of too many police officers towards their role, see O’Gorman, T, “The Future of Committals: A Defence Lawyer’s Perspective” in Vernon, J, (ed) *The Future of Committals: proceedings of a conference held 1-2 May 1990* (Canberra, Australian Institute of Criminology, 1991) p 121 at 123.

<sup>231</sup> MacFarlane, B, “Convicting the Innocent: a Triple Failure of the Justice System” (2006) 31 *Man L Jour* 403 at 439. See also Hunter and Cronin, Ch 1, n 59, 187-188.

United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor."<sup>232</sup>

[4.9.8] Though Australian and English prosecutors may not be subject to quite the same degree of public or political pressure as their United States counterparts,<sup>233</sup> it is, nevertheless, possibly naïve to expect that a modern prosecutor in any jurisdiction would be oblivious to external considerations and, as exhorted in cases such as *Livermore and MG*, to the outcome of a case. Any modern prosecutor with a success rate like that of the hapless Hamilton Burger of *Perry Mason* fame,<sup>234</sup> no matter how eminently fair he or she might be in practice, would be unlikely to advance far up the rungs of any prosecutorial ladder. Nevertheless, the model of the elected American style District Attorney with a vested political interest in a healthy conviction rate holds little, or no, attraction.<sup>235</sup> The idea of any responsible prosecutor in either Australia or England boasting, let alone campaigning for political office, on the basis of their "strike rate" at trial as American prosecutors have been known to do)<sup>236</sup> would be likely to appear to most observers as both unprofessional and crass.<sup>237</sup> No-one would now seriously countenance or advocate a return to the role of the prosecutor as a zealous partisan persecutor as typified by Coke in *Raleigh* or to prosecutorial advocacy involving the blatant appeals to religious or national prejudice seen in cases such as *Vaughan* or *Courvoisier* or *House* or the overblown rhetoric that occurred in many of the early Australian cases when prosecution counsel was confronting defendants who were perceived as "enemies of society" or whose alleged crimes were otherwise "beyond the pale."<sup>238</sup> But such undesirable examples of prosecutorial conduct aside, it is highly debatable whether the concept of the prosecutor as the embodiment of objectivity in the criminal justice system is either desirable or achievable.

[4.9.9] The traditional rationale of an adversarial system of criminal justice is that the truth is best calculated to emerge from the fray of a vigorous partisan contest between

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<sup>232</sup> Borchard, E, *Convicting the Innocent: Errors of the Criminal Justice System* (Hamden, Archon Books, 1961) p xv.

<sup>233</sup> It is well known that in the prosecutorial offices of the United States that there is considerable political and professional pressures to boast of an impressive "success rate" in the prosecution of offenders, see Ferguson-Gilbert, Ch 1, n 184, 289-297; Fisher, above, n 8, 204-208; Hoeffel, Ch 1, n 45, 1140; Smith, Ch 1, n 7, 388-391 and Medwed, above, n 147, 134-158. As Judge Frank notes, the prestige of a "successful" (measured by a record for the largest possible number of convictions) prosecutorial career "has landed many a prosecutor in the governor's mansion or in the United States Senate," see Frank and Frank, above n 18, 236.

<sup>234</sup> See Angiolini, Ch 1, n 5. Hamilton Burger was the hapless prosecutor who "lost" 250 odd murder cases in succession against the redoubtable Perry Mason but somehow still managed to remain as District Attorney.

<sup>235</sup> See, for example, Turner, Ch 2, n 22, 446-447 and Smith, Ch 1, n 7, 388-391.

<sup>236</sup> See, for example, Bresler, K, "I Never Lost a Trial: When Prosecutors Keep Score of Criminal Convictions" (1995-96) 9 Geo J Legal Ethics 537 and Medwed, above n 147, 151-156. This has even extended to the distasteful sight of prosecutors relying upon their prowess in sending defendants to "death row" in their election campaigns, see Bresler, K, "Seeking Justice, Seeking Election and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates Campaigning on Capital Convictions" (1994) 7 Geo J Leg Ethics 941 at 945.

<sup>237</sup> See, for example, Turner, Ch 2, n 22, 443 and 446-447 and Bresler (1995-1996), above n 236, 541.

<sup>238</sup> See the discussion in Part 5 of Chapter 3.

two opposing sides.<sup>239</sup> However, this is subject to the crucial qualification that there must be equality between the two sides.<sup>240</sup> As Frederick Calvert, an English barrister noted as early as 1836 amidst the debate preceding the *Prisoners Counsel Act*, “I find two principles accepted with universal consent. One, that prosecution and prisoner ought to proceed upon perfectly equal terms; another, that the sole object in criminal trials is to ascertain the truth.”<sup>241</sup> Though Cairns asserts, with some justification I would suggest that, it is unrealistic to achieve “perfect” equality between the opposing sides of a criminal trial,<sup>242</sup> Calvert’s comments, nevertheless, illustrate that there must exist some measure of equality between the parties if the adversarial system is to function properly and achieve its stated purpose of discovering the truth and delivering “justice”. Just as the theory of the adversarial system was not realised in practice in the 1800s when there was not genuine equality between the prosecution and the still disadvantaged defence,<sup>243</sup> similarly in a modern context it is questionable whether the rationale of the adversarial system can be realised when the prosecutor, acting within the constraints of the minister of justice role, is compelled to play a lesser role in the proceedings than that of the defence lawyer. The proper working of the adversarial system may well be frustrated because the prosecutor effectively enters the fray with one arm tied behind his or her back. Fisher likens the adversarial system to the prosecutor being “sent into battle with a blunted sword while her [or his] opponents’ is sharpened to a razor’s edge.”<sup>244</sup> If this is, indeed the case, it suggests that the inherent conflict between the dual prosecutorial roles of adversarial advocate and minister of justice, despite the view of commentators such as Gourlie, is ultimately not susceptible of resolution. The imposition of the “fundamentally inconsistent obligations” of the dual prosecutorial roles, as Uviller argues, bends prosecutors into “psychological pretzels”<sup>245</sup> or, as Steele observes, reduces them to “schizophrenic muck.”<sup>246</sup>

## Part 10: Rationale for Change: A “New” Prosecutor for the 21<sup>st</sup> Century?

[4.10.1] Modern prosecutors in England and Australia are subject to a myriad of pressures and demands in a broad range of areas such as the increasing regard to be had to the interests and welfare of victims and witnesses,<sup>247</sup> demanding duties of disclosure in

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<sup>239</sup> See Frank and Frank, above 18, 225-226 and Grosman, Ch1, n 28, 580. See also the discussions in Part 1 of Chapter 1 at [1.1.9] and Chapter 2, n 300. The veracity of this premise is often doubted, see Chapter 1, n 33.

<sup>240</sup> See Chapter 2, n 308 and n 309.

<sup>241</sup> Cairns (1998), Ch 2, n 43, 98.

<sup>242</sup> *Ibid.*

<sup>243</sup> See May, Ch 2, n 33, 200. See also Chapter 2, n 328.

<sup>244</sup> Fisher, above n 8, 210-211.

<sup>245</sup> Uviller, above n 9, 1697.

<sup>246</sup> Steele, Ch 1, n 165, 982.

<sup>247</sup> See, for example, MacDonald, K, “Our System of Justice must enjoy public confidence,” *The Independent*, 1 February 2005, highlighting the increasing modern preoccupation of “putting the victim at the heart of the criminal justice system.” See further Flatman, G, and Bagaric, M, “The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making” (2001) 6 Deakin L Rev 238.

relation to unused material,<sup>248</sup> the choice and calling of witnesses at trial,<sup>249</sup> the prosecutor’s role in sentencing and last, but not least, modern managerial responsibilities.<sup>250</sup> Many of these matters would not have troubled or disturbed the modern prosecutor’s historical counterparts during the period from the early 1800s to the mid 1960s. The modern prosecutor is subject to a degree of public, press and political scrutiny that would not have been experienced by his or her historical counterpart.<sup>251</sup>

[4.10.2] The typical defendant in the English criminal process of the early 1800s, as discussed in Chapter 2, occupied an unequal position as against the prosecution. The development of the prosecutorial role of a minister of justice during this period can be viewed as acknowledging the defendant’s disadvantaged position within the newly adversarial criminal process of the period. The prosecutorial duty of restraint, like other procedures and rules of evidence that emerged at the same time such as the hearsay rule, was one means, amongst others,<sup>252</sup> that “has its origin in the late 18th and early 19th centuries when the cards at trial were so stacked against defendants that judges felt the need to even the odds.”<sup>253</sup>

[4.10.3] “The criminal practice and procedure of two centuries ago bears little resemblance to that of the present day.”<sup>254</sup> It must be acknowledged that the criminal process of today, especially in terms of the rights that are accorded to an accused, represents an immeasurable improvement on the system that existed for the typical accused in the early 1800s as has been described in Chapter 2.

[4.10.4] Yet, despite great improvements in the position of the modern accused,<sup>255</sup> it is still not one of true equality with the prosecution.<sup>256</sup> The investigative and prosecutorial powers and resources of the modern state are still likely to exceed those of all but the wealthiest private defendant.<sup>257</sup> However, it would be disingenuous to pretend that the

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<sup>248</sup> The extent of these duties is discussed in Chapters 5 and 6.

<sup>249</sup> The extent of these duties, especially in Australia, will be discussed in Chapters 8 and 9.

<sup>250</sup> Like most modern government agencies, prosecutors are not immune to the modern preoccupation with performance and cost, see Mackie, A, *et al*, “Preparing the Prosecution Case” [1999] Crim LR 460 and Freiberg, A, “Managerialism in Australian Criminal Justice: RRI for KPIs” (2005) 31 Monash Uni L Rev 12. “Efficiency, effectiveness and economy became the trinity,” at which prosecutors, like others in the public sector, “were required to worship,” see Sanders and Young, Ch 1, n 27, 41.

<sup>251</sup> See further Angiolini, Ch 1, n 5.

<sup>252</sup> McHugh J notes that in addition to the hearsay rule, the rule requiring corroboration of the evidence of certain classes of witnesses and the rule against self-incrimination were, if not established, at least reaffirmed and refined, during this period, see *R v Azzopardi* (2001) 205 CLR 50 at 95-103. To these one can add the restrictions on the use of pre-trial confessions and the intricate requirements for indictments.

<sup>253</sup> Auld, Ch 2, n 333, Ch 11 at [95].

<sup>254</sup> *Sobh v Commissioner of Police* (1993) 65 A Crim R 466 at 469 per Brooking J. See also Shorter Trials Committee, above n 19, 5-7.

<sup>255</sup> This is especially as a result of the development of the prosecution’s modern duty of full disclosure.

<sup>256</sup> See, for example, Editorial, “Financial Restraints on the CCRC” (2007) 171 JPN 825.

<sup>257</sup> See *Ragg v Magistrates’ Court of Victoria & Corcoris* (2008) 179 A Crim R 568 at 581. Though the counter argument to this assertion is that, as was suggested by Cunneen in her 2005 speech, the protections accorded to a modern accused are such that the pendulum has now swung too far in favour of the accused, see the previous discussion at Part 4 of this Chapter at [4.5.9].

typical modern accused is in the same disadvantaged position *vis-à-vis* the prosecution as the typical accused in either England or Australia in the 1800s. The historical rationale for the maintenance of the prosecutorial role as a minister of justice as existed in the nineteenth century is considerably weakened in the modern adversarial system given the comprehensive protections accorded the modern accused, the recent advances in the law of prosecution disclosure and the emergence of the robust defence tactics now seen on occasion. The typical modern accused and modern prosecutor are on a far more level, albeit not completely level, playing field than were their typical nineteenth century counterparts.<sup>258</sup>

[4.10.5] The common law has never been a rigid and inflexible instrument that remains unchanging from one generation to the next. In particular it has always been accepted that both the practical requirements and the concept of what is fair and appropriate in the context of a criminal trial can, and indeed should, change in light of changing social standards and circumstances.<sup>259</sup> As Lord Bingham explained in *R v H*:<sup>260</sup>

Fairness is a constantly evolving concept. Hawkins J (Reminiscences, (1904) vol 1, chap IV, p 34) recalled a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted 2 minutes 53 seconds, including a terse jury direction: ‘Gentlemen, I suppose you have no doubt? I have none.’ Until 1898 a defendant could not generally testify on his own behalf. Such practices could not bear scrutiny today. But it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.<sup>261</sup>

[4.10.6] The appropriate prosecutorial role for the 21<sup>st</sup> century should not necessarily be held to a standard that is “frozen in time” from the early 1800s and, as noted by Lord Bingham, it may be appropriate to recognise that what was regarded as necessary in the criminal process of the early 1800s to ensure the fairness of the criminal trial need not necessarily apply today. “Many aspects of a [criminal] system developed over the centuries to introduce safeguards against the forensically primitive jury trials and harsh penal regimes of the time,” as Lord Justice Auld observed in 2001, “may not fit, or be necessary for, modern trials, whether by judge or jury or in some other form.”<sup>262</sup> Other doctrines and once unchallenged rules of evidence and procedure that also emerged in the 1700s and 1800s to enhance the fairness of the criminal process have been modified or even discarded in the changing circumstances of today. Some, like the rule against the use at trial of pre-trial confessions and the technical requirements for an indictment, have long since disappeared.<sup>263</sup> Others such as the rule for corroboration in sexual offences

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<sup>258</sup> See, for example, Shorter Trials Committee, above n 19, 6. Some commentators in England, however, have argued that the many legislative reforms of recent years have led to a steady erosion in the protections accorded to an accused and have the effect of drastically weakening his or her position within the legal process, see Sanders and Young, Ch 1, n 27, 21 and Bentley, Ch 2, n 158, 300-301. Indeed, Bentley asserts that the legislative changes of recent years have so weakened the status of the accused that “if present trends continue we may yet come to look upon it [the 1800s] ...as a golden age.” (*Ibid*, 301).

<sup>259</sup> See *State v O’Donoghue* [1976] IR 325 at 350 per O’Higgins CJ and *R v Dietrich* (1992) 177 DLR 292 at 328 per Deane J.

<sup>260</sup> [2004] 2 AC 134.

<sup>261</sup> [2004] 2 AC 134 at 150.

<sup>262</sup> Auld, Ch 2, n 333, Ch 11 at [5].

<sup>263</sup> See Bentley, Ch 2, n 158, 137 and 300.

cases have been abolished only comparatively recently after years of sustained criticism.<sup>264</sup> Others such as the rule against hearsay have been widely questioned and criticised<sup>265</sup> and while not abolished have certainly been the subject of reform in recent years.<sup>266</sup> One may wonder whether a prosecutorial role that evolved in the distinctive circumstances of early nineteenth century England should continue to be rigidly applied to the very different legal process in both Australia and England of the 21<sup>st</sup> century.

[4.10.7] So too it seems timely to ask whether the balance in the prosecutorial role between adversarial advocate and minister of justice should be recalibrated more in favour of the adversarial role. In the modern criminal justice system, which accords defendants a comprehensive range of rights and protections, unquestioning adherence and even extension of a possibly outmoded concept of the prosecutorial role may have the practical effect of “allowing guilty men to shelter behind rules which look back to an age when the accused regularly took their trials undefended?”<sup>267</sup>

## **Part 11: The Prosecutor’s Role: If Not Minister of Justice, What?**

[4.11.1] There is a real question as to the continued application of the term minister of justice and, perhaps more importantly, as to the appropriate prosecutorial role conveyed by it. I would argue that the term minister of justice is confusing and capable of meaning different things to different people.<sup>268</sup> Bresler categorises the term minister of justice as a “pretty phrase”<sup>269</sup> and notes that as the term has been applied at one time or another to virtually any party associated with the criminal justice system,<sup>270</sup> even process servers,<sup>271</sup> it loses any real meaning.<sup>272</sup> Bresler asserts that the advice of the American Bar Association to prosecutors to act as “ministers of justice” or “administrators of justice” is unclear and confusing and no more than “juris-babble that is practically meaningless to prosecutors and the ABA itself...Unfortunately, the minister of justice language, so lofty sounding at first, degenerates into malarkey on closer examination.”<sup>273</sup> I would suggest that Bresler’s criticisms are well-founded. The minister of justice term has been “the source of much criticism amongst legal scholars” and is “unworkably vague for the

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<sup>264</sup> See, for example, s 32 of the *Criminal Justice and Public Order Act* 1994 (England), s 34I(5) of the *Evidence Act* 1929 (SA), ss 136 and 371A of the *Criminal Code* (Tas) and s 164 of the uniform *Evidence Act*. See further Hunter *et al*, above n 19, 1184-1189.

<sup>265</sup> See, for example, Auld, Ch 2 n 333, Ch 11 at [95]-[104] and Hunter *et al*, above n 19, 1470-1473.

<sup>266</sup> See, for example, ss 116-123 of the *Criminal Justice Act* 2003 (England) and various provisions of the Australian *Uniform Evidence Act*, especially s 65(8).

<sup>267</sup> Bentley, Ch 2, n 158, 301. Bentley quotes this view but does not hold it himself.

<sup>268</sup> See Zacharias, above n 9, 46-49.

<sup>269</sup> Bresler, K, “Pretty Phrases: The Prosecutor as ‘Minister of Justice’ and ‘Administrator of Justice’” (1995) 9 Geo Legal Ethics 1301 quoting *Arthur v Johnson* (1954) 83 SE (2d) 314 at 316.

<sup>270</sup> *Ibid* at 1302-1303. Bresler notes that trial judges, appellate judges, lawyers in general, jurors, court personnel and police officers as well as prosecution counsel have all been labelled as “ministers of justice.”

<sup>271</sup> *State v Smith* (1814) 1 NH 346 at 347.

<sup>272</sup> Bresler (1995), n 269, 1302.

<sup>273</sup> *Ibid*, 1301.



purposes of meaningful interpretation and application.”<sup>274</sup> More than a “glib phrase”<sup>275</sup> or “pretty phrase” is needed to provide useful guidance to practitioners in the discharge of their professional duties. The question is what expression or role could replace it?

[4.11.2] There are assertions that the traditional prosecutorial role should be refined to reflect the recent prominence of victims and witnesses within the modern criminal justice system.<sup>276</sup> It has been suggested that the prosecutor should act as “a quasi client centred counsellor” or “pure advocate and representative of the crime victim.”<sup>277</sup> There are even suggestions that prosecutors should act as “avengers” and “seek justice” on behalf of the victim.<sup>278</sup> However, any such suggestions are untenable and fail to reflect the nature of the prosecutorial role in practice. Nichols dismisses any notion of the prosecutor as an “advocate” of the victim:

“[as] a fundamental departure from the established law of the country...Such a change is contrary to our entire system of criminal justice. The laws of our country are designed to protect the due process rights of criminal defendants from the arbitrary imposition of criminal punishments. Our system is also designed to prevent vengeance from replacing justice. It is this concern that lends the greatest support to the use of impartial representatives of the government as prosecutors. The goal of the prosecutor ‘in a criminal prosecution is not that it shall win a case, but that justice shall be done’. That is not to say that victims have no role in the criminal law process, only that the relationship between the prosecutor and the victim must remain appropriately limited. The prosecutor’s larger duty to the public interest precludes collapsing his role into that of the victim’s advocate.”<sup>279</sup>

[4.11.3] This is a compelling argument. There are strict limits to how far the prosecutorial role can be refined to accommodate the views of the victim. It is inevitable that the wider overriding public dimension of the prosecutor’s role will conflict with any allegiance solely to the victim.<sup>280</sup> The fundamental objection to any reconceptualisation of the

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<sup>274</sup> Levine, S, “Taking Prosecutorial Ethics Seriously: a Consideration of the Prosecutor’s Ethical Obligation to Seek Justice in a Comparative Analytical Framework” (2004) 41 Hous L Rev 1337 at 1339. See also Smith, Ch 1, n 7, 377-378; Fisher, above n 8, 210; Medwed, Ch 1, n 42, 42-44; Zacharias, above n 9, 46-49 and Green and Zacharias, Ch 1, n 15, 868. See also the earlier discussion in Part 1 of Chapter 1 at [1.1.12].

<sup>275</sup> See Ashworth and Blake, Ch 1, n 55, 31.

<sup>276</sup> See, for example, Taylor and Byrne, above n 2, 329-330. See also Flatman and Bargaric, above n 246.

<sup>277</sup> Nichols, M, “No One can Serve Two Masters: Arguments Against Private Prosecutors” (2001) 13 Cap Def J 279 at 287. See generally Caplow, S, “What if there is no Client?: Prosecutors as ‘Counsellors’ of Crime Victims” (1998) 5 Clinical L Rev 1.

<sup>278</sup> Pirro, J, *To Punish and Protect: a DA’s Fight Against a System that Coddles Criminals* (New York, Touchstone Books, 2005) p 1. See also Gersham, above n 10, 569-572.

<sup>279</sup> Nichols, above n 277, 287-288.

<sup>280</sup> See Hall, above, n 76, 31; Erez, E, “Who’s Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice” [1999] Crim LR 545 at 554 and Gersham, above n 10, 561-562, 573-576 and 579. This fraught issue is especially apparent in cases of sexual assault (see Pokorak, J, “Rape Victims and Prosecutors: the Inevitable Ethical Conflict of De Facto Client/Attorney Relationships” (2007) 48 S Tex L Rev 695-732 and Lievore, Ch 1, n 20, 2 and 7) or domestic violence (see Buzawa, E and Buzawa, C, *Domestic Violence: the Criminal Justice Response* (Thousand Oaks, Sage Publications Inc, 2003) p 178), especially in relation to “no drop” policies which dictate continued prosecution even when the victim indicates that she does not wish to proceed (see *Ibid*, 197-203; Hall, above, n 76, 40-41 and Brown, T, *Charging and Prosecution Policies in*

prosecutorial role as an advocate of the victim’s interests is that the prosecutor’s duty is a duty owed to the court and not to the public at large or the accused,<sup>281</sup> or in fact to any other party within the criminal justice system.<sup>282</sup> “The Attorney-General<sup>283</sup> represents society at large and the public interest. The Attorney-General is not counsel to victim nor accused.”<sup>284</sup>

[4.11.4] One argument in favour of the minister of justice role is that, as more than one prosecutor has found in practice, the conspicuously fair prosecutor is more likely on occasion to be effective in practice, at least at trial before a jury, than the overly partisan or vindictive prosecutor. As was observed in *R v Bazely*<sup>285</sup> by Young CJ, “Experience suggests that the fairer the prosecutor the more devastating so far as the defence is concerned. Juries have been known to over-react against over-zealous prosecutors.”<sup>286</sup> Such reasoning may be appropriate to guide a particular prosecutor in an individual case but it does not serve as a persuasive rationale for the discharge of the prosecutorial role, especially considering the often overlooked fact that the bulk of a prosecutor’s work is done outside court.<sup>287</sup>

[4.11.5] It has been alternatively suggested that in the trial context the prosecution lawyer should be free to assume a fully adversarial role.<sup>288</sup> Seymour, a United States Attorney, describes how as the trial approaches “we become more and more aggressive in our protection of the case that we believe to be right.”<sup>289</sup> He notes that:

Finally at trial the prosecutor becomes the most zealous champion of justice you can imagine, he is then a full-fledged fighting advocate; and he should be...His job is now to fight fairly and firmly with all his might to see that truth and justice prevail.<sup>290</sup>

Other commentators support this approach and argue that the nature of the prosecutorial role should depend upon whether the case is at the pre-trial or trial stage.<sup>291</sup> Uviller

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*Cases of Spousal Assault: a Synthesis of Research, Academic and Judicial Response: Final Report* (Ottawa, Department of Justice, 2000) p 3-7).

<sup>281</sup> *Cannon v Tahche* (2002) 5 VR 317 at 340-341.

<sup>282</sup> The prosecutor does not owe any fiduciary duty to a defendant, potential accused or witness. Any such duty “would constitute bad law and render the task of prosecutor impossible,” see *M (K) v Desrochers* (2000) 52 OR (3d) 742 at [26].

<sup>283</sup> In this context referring to the Attorney-General’s traditional prosecutorial role. See also Chapter 2, n 5.

<sup>284</sup> *M (K) v Desrochers* (2000) 52 OR (3d) 742 at [27] per McKinnon J. Even recent legislative measures in various jurisdictions designed to improve the victim’s position within the criminal process cannot alter this basic fact, see *R v Tkachuk* (2001) 159 CCC (3d) 434 at 442 and *Vanscoy v Ontario* [1999] OJ No 1661.

<sup>285</sup> (1986) 21 A Crim R 19.

<sup>286</sup> (1986) 21 A Crim R 19 at 29.

<sup>287</sup> See Auld, Ch 2 n 333, Ch 10 at [1]; Baldwin and McConville, above n 68, 10; Potas, Ch 1, n 214, 57 and Roberts, J, “Too Little, too Late, Ineffective Assistance of Counsel, the Duty to Investigate, and Pre-Trial Discovery in Criminal Cases” (2004) 31 Ford Urb LJ 1097 at 1152-1153.

<sup>288</sup> See, for example, Zacharias, above n 9, 56, n 54 and Farrell, Ch 1, n 56, 299-302, 304-306 and 323.

<sup>289</sup> Seymour, W, “Why Prosecutors Act Like Prosecutors” (1956) 11 REC AB City NY 302 at 313. Seymour was a prominent American prosecutor.

<sup>290</sup> *Ibid.*

argues that whilst a neutral minister of justice approach should be adopted by those prosecutors who investigate, assess and negotiate,<sup>292</sup> those who conduct the trial of those cases that aren't resolved belong to a “different caste” and should be free to assume a zealous and adversarial approach.<sup>293</sup> Graham Mitchell QC offers a similar view. He suggests that once a criminal prosecution reaches the trial or “adversary stage,” it is entirely appropriate for the prosecutor to act as a vigorous advocate for the public interest and, provided prosecution counsel avoids engaging in unprofessional conduct, it is entirely appropriate for him or her to advocate zealously on behalf of the state.<sup>294</sup> Mitchell notes that the important public responsibilities undertaken by prosecution counsel operate on a spectrum, and the significance of each role waxes and wanes depending upon which phase of the criminal process the prosecutor finds him or herself in. He points out that at times these roles intersect, whilst at others they converge, and at still others, one or the other prosecutorial role predominates. Mitchell acknowledges that generally the quasi-judicial role of Crown counsel as a minister of justice is paramount throughout the pre-charge and charging phases, and predominates throughout much of the pre-trial phase, most especially when fulfilling the Crown's vital responsibility to provide full and frank disclosure of its case to the defence.<sup>295</sup> The adversarial role of prosecution counsel as a vigorous advocate on behalf of the public interest emerges and gains in significance in the final stages of the pre-trial phase, and predominates throughout the trial phase.<sup>296</sup>

[4.11.6] This view is not without some substance. In some situations the prosecution lawyer should adhere to a minister of justice role. As Mitchell suggests the pre-trial responsibility of the prosecution to provide full and frank disclosure of any relevant material in its possession is perhaps, as will be discussed in Chapters 5 and 6, one of the most important minister of justice prosecutorial responsibilities. In other situations an adversarial approach may be appropriate.<sup>297</sup> For example, as Mitchell suggests, the prosecution lawyer at trial should be free, at least in some circumstances, to assume a vigorous and adversarial role. Though Mitchell is correct to suggest that the prosecutorial role may depend on the function it is performing, the suggestion that a neat distinction can be drawn between the pre-trial and trial stages to define the prosecutorial role is problematic. It is a “simplistic solution” to assert that this distinction will necessarily govern the prosecutorial role.<sup>298</sup> Indeed, Mitchell himself acknowledges that this distinction is “simplistic.”<sup>299</sup> It is also no easy task, given the modern regime of

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<sup>291</sup> See, for example, Mitchell, above n 9, 497-500 and Zacharias, above n 9, 113.

<sup>292</sup> In this context “plea bargaining” to try and resolve a case without it having to proceed to trial.

<sup>293</sup> Uviller, above n 9, 1716.

<sup>294</sup> Mitchell, above n 9, 496-497. Mitchell acknowledges the tension between the prosecutor's quasi-judicial and adversarial roles. He argues, however, that these two functions are not incompatible when viewed “contextually...[as] a synergy is created through the dynamic exercise of these functions” (*Ibid*).

<sup>295</sup> *Ibid*, 497-500.

<sup>296</sup> *Ibid*, 497-498.

<sup>297</sup> See, for example, McMunigal, Ch 1, n 173, 1472.

<sup>298</sup> See Melilli, Ch 1, n 12, 698.

<sup>299</sup> Mitchell, above n 9, 498.

comprehensive pre-trial case management when decisions central to the conduct of the trial may be made,<sup>300</sup> to categorise just what is or is not part of the pre-trial or trial stage of proceedings. For example, is the prosecution’s choice of the witnesses to be called at trial part of the pre-trial or trial stage?<sup>301</sup>

[4.11.7] It is clear that in the performance of some of his her pre-trial duties the prosecutor must still adhere scrupulously to the expectations of the traditional role of a minister of justice. The prosecutor’s crucial role in the disclosure of the prosecution case to the defence is one such example as will be argued in Chapters 5 and 10.<sup>302</sup> Furthermore there are other circumstances, even at the trial stage, which might still call for greater prosecutorial restraint than might otherwise ordinarily be the case in a trial where both parties are legally represented. In cases involving sexual offences of children which give rise to strong feelings, there remains a need for the prosecutor to refrain from appealing to passion or prejudice. Another “trial” situation that clearly calls for prosecutorial restraint and fairness is where the accused is not legally represented.<sup>303</sup> No prosecutor should take advantage of a legally unrepresented accused. However, even in these categories of cases there are limits to which it is realistic to expect the prosecutor to curtail his or her adversarial role. No prosecutor, no matter how fair or restrained, can perform or be expected to perform the function of either defence counsel<sup>304</sup> or the court. A prosecutor in criminal proceedings is a minister of justice as was accepted in a 1995 case<sup>305</sup> by Steyn LJ but, “Nevertheless, the reality is that a defendant in criminal proceedings must rely on the judge or his own lawyers to protect his [or her] interests.”<sup>306</sup> Ultimately it cannot be overlooked, as is stated in *McCreed*, that “a Crown Prosecutor adopts an adversarial role in a criminal trial and is truly an adversary of the accused.”<sup>307</sup>

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<sup>300</sup> See the discussion in Part 10 of Chapter 9 at [9.10.14]. See further the discussion in Part 11 of Chapter 9 for the importance of modern pre-trial case management in criminal litigation.

<sup>301</sup> This is not a simple question. Traditionally the prosecutor nominates the witnesses it intends to call at trial at, or soon after, committal, when the witnesses are said to be “named on the back of the indictment,” see further Chapter 7, n 12. This can be long before the actual trial.

<sup>302</sup> The extent and practical means of discharging this requirement will be considered in Chapter 6.

<sup>303</sup> Though it is comparatively rare in either England (see Spencer, Ch 1, n 190, 242 and Ministry of Justice, *Judicial and Court Statistics 2007* (London, Ministry of Justice, 2008), p 184 (91% of defendants at the Crown Court receive publicly funded legal representation) or Australia (see Craigie, C, “Unrepresented Defendants: The Criminal Justice Perspective,” 2005, available at: [http://www.publicdefenders.nsw.gov.au/lawlink/pdo/ll\\_pdo.nsf/pages/PDO\\_unrepresentedlitigants](http://www.publicdefenders.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_unrepresentedlitigants)) as a result of the ECHR and *R v Dietrich* (1992) 177 CLR 292 to find an accused charged with a serious offence legally unrepresented except by choice. However, the situation is different in the summary courts, see McBarnet, Ch 1, n 158, 182-183; Astor, H “Unrepresented Defendant Revisited – a Consideration of the Role of the Clerk in Magistrates’ Courts” (1986) 13 Jour Law & Soc 225 and Findlay, M, *et al*, *Australian Criminal Justice* (3<sup>rd</sup> ed) (South Melbourne, Oxford University Press, 2005) p 174 (quoting a 2000 NSW study that found about half of the defendants who appeared in the Local Court were unrepresented).

<sup>304</sup> See *R v Dietrich* (1992) 177 CLR 292 at 334-335 per Deane J where it was stated that one reason for requiring an accused to be legally represented was the fact that it was not part of the function of prosecution counsel, even if acting as a minister of justice, to provide the advice, guidance and representation which an accused must ordinarily have if his case is to be properly presented.

<sup>305</sup> *Elgouzouli-Daf v Commissioner of Police for the Metropolis & CPS* [1995] QB 335.

<sup>306</sup> *Elgouzouli-Daf v Commissioner of Police for the Metropolis & CPS* [1995] QB 335 at 348.

<sup>307</sup> *R v McCreed* [2003] WASC 275 at [33].

[4.11.8] It is my argument that the practical content of the prosecutorial role should depend on the particular facts of the case and the precise function that prosecution counsel is performing. A neat distinction cannot be drawn between the trial and pre-trial stages. In simple terms what may be appropriate in one factual situation or with respect to one prosecutorial function may be inappropriate in another factual situation or prosecutorial function. It is suggested that in relation to certain functions or decisions or in certain factual situations the prosecutor should be free to assume a more vigorous and adversarial role in the proceedings. For example, as will be argued in Chapter 10, it is my contention that in relation to its choice of witnesses at trial the prosecution should, once its duty of disclosure has been satisfied, possess a broad discretion to present its case at trial as it wishes and not be subject to any minister of justice obligation to call any material witness at trial, whether their evidence helps or hinders the prosecution case. Similarly, where the accused is legally represented and there exists broad equality between the positions of the prosecution and defence, prosecution counsel should be free to assume a more robust approach at trial in the presentation of the Crown case similar to that of defence counsel.

[4.11.9] Accordingly, in some cases there may be, notwithstanding Turner’s contrary view,<sup>308</sup> a need for the modern prosecutor to “fight fire with fire.” Not only are the parties in the modern adversarial process more evenly matched than they were in the early 1800s when the minister of justice role emerged, but I would argue that the modern prosecutorial role must take account of the overly zealous and “no holds barred” approach of some defence lawyers. Such tactics are by no means unusual.<sup>309</sup> A former Commonwealth Director of Public Prosecutions commented that “it is arguable that some defence counsel have stretched their ethical obligations to the limit in assisting defendants who perceive it as in their best interest to delay and obfuscate the case against them.”<sup>310</sup> Justice Ipp in an extra-curial article commented on the “perversion” of the adversarial system of justice arising from this trend, especially in cases of serious commercial fraud, where some defence lawyers resort to the “filibuster defence” in an effort to secure the acquittal of their client “through exhausting and confusing witnesses and the jury by causing as much delay and obfuscation as possible.”<sup>311</sup> Justice Phillips is of the same view and has gone so far as to warn that “this culture will destroy our system of justice sooner rather than later unless steps are taken to stop it.”<sup>312</sup> Hunt CJ at CL in *R v*

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<sup>308</sup> See above n 11.

<sup>309</sup> See *R v Elliott* [2003] OJ 4694 at [177]-[180] and Simon, W, “The Ethics of Criminal Defence” (1993) 91 Mich L Rev 1703. See also above n 46.

<sup>310</sup> Rozenes, M, “The Role of the DPP in the Investigation and Prosecution of Complex Fraud,” Speech delivered at the ASC Law Enforcement Conference, Perth, 16 September 1994, available at: <http://www.cdpp.gov.au/Director/Speeches/19940916mr.aspx>. See also the similar strong criticisms offered by a subsequent Commonwealth DPP, Bugg, D, “Prosecuting Fraud,” Speech delivered at the Australian Institute of Criminology Fraud Prevention and Control Conference, Surfers Paradise, 25 August 2000, available at: <http://www.cdpp.gov.au/Director/Speeches/20000825db.aspx>.

<sup>311</sup> Ipp, Ch 1 n 173, 96-97 and also 98-102. See also the similar strong comments of a trial judge quoted by Justice Phillips deploring the “alarming culture” at the Victorian Bar that dictated that no case was too long or too costly, no issue too small to explore at inordinate length, no number of questions too many and no speech too long and that concessions and admissions should never be made, see Phillips, J, “The Duty of Counsel” (1994) 68 ALJ 834.

<sup>312</sup> *Ibid.* See the similar strong warning in *R v Wilson & Grimwade* [1995] 1 VR 163 at 180.

*Sandford*<sup>313</sup> has also criticised this style of defence advocacy and contrasted the advocate who only fights the real issues in dispute with the vexatious advocate “familiar to those with experience of the criminal courts” who fights every possible issue (and sometimes issues which are impossible), in the apparent pursuit of the theory that by doing so an important Crown witness might be run over by a bus on his or her way to court and the prosecution will fail.<sup>314</sup> His Honour observed that such advocates would demand “every rat to be chased up every drainpipe, every “I” to be dotted and every “T” crossed, whether or not they were really in issue.”<sup>315</sup>

[4.11.10] In a modern adversarial criminal trial, particularly in the face of such vexatious defence tactics, it is not in the interests of justice that there is this imbalance between the positions of the defence and the prosecution. Hunter and Cronin note the “lack of symmetry in the criminal justice system.”<sup>316</sup> They highlight that while prosecutors are perceived “as fighting with one hand tied behind their backs, defence lawyers by contrast are said to have a free hand in the trial.”<sup>317</sup> Such an unequal playing field does not promote the purpose of an adversarial contest between two evenly matched parties. Lord Justice Auld, in an influential passage, offered the following observations as to the purpose of a modern criminal trial:

A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for the truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent.<sup>318</sup>

[4.11.11] There is a view that prosecutors may need to take a more assertive approach in the modern criminal process to resist “excessive” defence zeal and to help ensure that the criminal trial functions properly. This suggests that it might be appropriate, particularly in light of the stringent approach taken in cases such as *Livermore* and *MG*, to consider whether the common law prosecutor should be permitted greater freedom to adopt a more vigorous and forceful role within the criminal justice system. I would argue that the confidence of authors such as Gourlie that the tension in prosecutorial roles between active advocate and minister of justice can be satisfactorily reconciled is misplaced. I would suggest that a more robust role may be countenanced in cases where the accused is legally represented. This would be more consistent with the nature of the prosecutor’s role within a modern adversarial process and might diminish, or even eliminate, the

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<sup>313</sup> (1994) 33 NSWLR 172.

<sup>314</sup> (1994) 33 NSWLR 172 at 188-189.

<sup>315</sup> (1994) 33 NSWLR 172 at 188-189. Hunt CJ at CL noted that this style of advocacy had “blossomed” after the introduction of relatively unrestricted legal aid and expressed the hope that “it will wither with the recent introduction of lump sum legal aid.” But “old habits die hard” and in his opinion it would obviously require the strong exercise of the additional powers recently recommended for the criminal courts to bring the conduct of criminal trials back to the realities of fighting the real issue. Both Justice Ipp (see Ch 1, n 173, 97) and Justice Phillips (see above n 311, 834-835) warned that if the vexatious school of defence advocacy continued legislation would be necessary.

<sup>316</sup> Cronin and Hunter, Ch 1, n 59, 223.

<sup>317</sup> *Ibid.* Though see also Chapter 2, n 74.

<sup>318</sup> Auld, Ch 2, n 333, Ch 10 at [154] quoted with approval in *R v Gleeson* [2004] 1 Cr App R 406 at [36].

acute tension that arises from casting the prosecutor as a minister of justice in an adversarial process.

[4.11.12] The prosecutor should never become a “crusader” for justice, as some American prosecutors have been known to do,<sup>319</sup> or an officious zealot.<sup>320</sup> Like any lawyer, it is crucial that prosecution counsel should act always to promote the administration of justice and never act in an unethical or improper manner.<sup>321</sup> It would be wrong for a prosecutor to take advantage of a legally unrepresented accused. However, that is not the necessarily the same as compelling the prosecutor to assume the role of a judicious minister of justice. It is opportune to ask whether the prosecuting lawyer at trial should be free, at least where the accused is legally represented and there is a more genuine contest of equals, to “fight fire with fire.” Corrigan argues that the prosecutorial role can be reduced to a “single precept...to press the prosecution case forcefully, according to the rules.”<sup>322</sup> Or as an American commentator colourfully put his advice to prosecutors, “Kick butt, don’t kick groin.”<sup>323</sup>

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<sup>319</sup> See, for example, Piro, above n 278 and Fisher, above n 8, 205 and 209-210. See also Yaroshefsky, E, “Wrongful Convictions: Is it Time to take Prosecution Discipline Seriously?” (2004) 8 UDC/DCSL L Rev 275 at 278 commenting that in some cases of wrongful conviction in the United States, “a team of police and prosecutors were so convinced of their righteousness that they were willing to do anything to get their man.”

<sup>320</sup> See above n 65.

<sup>321</sup> Many of the cases in which the courts have expressed their disapproval of the prosecutor’s conduct at trial and invoked the role of a minister of justice could be explicable or equally justified on the basis that the prosecutor’s conduct had breached the paramount duty of any lawyer as an officer of the court to act ethically and to promote the administration of justice, see further the references in Chapter 2, n 74.

<sup>322</sup> Corrigan, Ch 1, n 235, 542.

<sup>323</sup> Bresler (1995-1996), above n 236, 544, n 27.

# CHAPTER 5

## THE DEVELOPMENT OF THE PROSECUTOR'S ROLE IN ENGLAND AND AUSTRALIA WITH RESPECT TO ITS DUTY OF DISCLOSURE: "NOT A SORT OF TACTICAL TIT FOR TAT OR A GAME OF HAPPY FAMILIES"?

*In Chapter 4 it was argued that the minister of justice model may serve as an inappropriate model to govern all the functions of the prosecution lawyer. However, it was acknowledged that certain prosecutorial duties should continue to be performed according to the minister of justice model and are not suited to an adversarial approach. One of these is the crucial duty of disclosure to the defence, whether this is evidence upon which the prosecution is choosing to rely at trial or so-called unused material. This Chapter will establish that where this duty is approached on an adversarial or partisan basis, experience has demonstrated that grave injustices can result. This Chapter traces the three phases in the history of the duty: first, when the prosecutor was entitled to act as a partisan advocate, followed by the informal "Old Boys Act" approach to disclosure which dominated most of the 20<sup>th</sup> century and culminating in the modern insistence on candour demonstrated by landmark decisions such as *R v Ward* and *R v Mallard*. Though the tensions of the dual prosecutorial roles of minister of justice and adversarial advocate are a recurring feature in the development of the law, the fundamental theme that emerges in relation to the issue of disclosure is that the prosecutor must act as the frank minister of justice. There is no place in the modern criminal process either for the prosecutor to act as the partisan advocate or to rely on the informal "Gentlemen's Club" approach to disclosure. However, demanding and problematic as the prosecutor's modern duties of disclosure may be, I would argue that in this area, "The prosecutor must act as a minister of justice, presenting the prosecution evidence fairly, making full disclosure of relevant material and ever conscious that prosecution must not become persecution."<sup>1</sup>*

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<sup>1</sup> Quoted in the Hong Kong Department of Justice, *Statement of Prosecution Policy and Practice* (Hong Kong, Department of Justice, 2002), [4.4], available at: <http://www.doj.gov.hk/eng/public/pub20021031con.htm>.



## Part 1: The Prosecutor's General Role: "Minister of Injustice"?

"The question of discovery in criminal cases is not the sort of tactical tit for tat or a game of Happy Families<sup>2</sup> played according to technical rules such as if you do not say thank you for the card you lose your turn. It is a serious matter conducted in a court of law and, one piously hopes, in a court of justice as well."<sup>3</sup>

[5.1.1] This was the pithy comment offered by Rougier J in *R v Livingstone*<sup>4</sup> in 1993 when denouncing what he saw as the partisan and unhelpful approach assumed by prosecution counsel in that case to the disclosure of probative material in the hands of the prosecution. Rougier J's conception of the prosecutorial role in respect of disclosure accords with the wider notion of the prosecuting lawyer, whether at trial or in the preparation of the Crown case for trial, as the minister of justice who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry but whose duty is purely to assist the court to make certain that justice is done as between the accused and the State.<sup>5</sup>

[5.1.2] Of all the manifestations of the prosecutor's duty to act as a minister of justice,<sup>6</sup> perhaps none is more crucial to the fairness of the trial or the integrity of the criminal process than the requirement to ensure that all material evidence, whether such evidence advances the prosecution cause or not, is brought to the attention of the court and/or the accused. This requirement appears in two distinct but closely linked prosecution duties. Firstly, there is a widely (though not universally) supported proposition that the prosecutor must, in deciding what witnesses to call at trial, ensure that any significant witnesses, whether their testimony helps or hinders the prosecution case, are called to testify as prosecution witnesses.<sup>7</sup> Secondly, the prosecution is now required to furnish the accused not only with the evidence upon which it intends to rely on trial, but also with any additional so-called unused material, in its possession that may have any bearing on the case.<sup>8</sup> This duty of disclosure is not confined to material helpful to the prosecution case but extends to any material that assists the defence case or undermines

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<sup>2</sup> This is a traditional competitive family card game in the United Kingdom.

<sup>3</sup> *R v Livingstone* [1993] Crim LR 597 at 598 (otherwise unreported); Court of Appeal, 8 March 1993, Transcript: Martin Walsh Cherer. This decision will be considered in more detail in Part 6 of this Chapter at [5.6.4].

<sup>4</sup> [1993] Crim LR 597.

<sup>5</sup> See *R v Lucas* [1973] VR 693 at 705 per Newton J and Norris AJ. See also *Mohammed v State* [1999] 2 WLR 552 at 564, *R v Randall* [2002] 1 WLR 2237 at 2241-2242, *R v Hay & Lindsey* [1968] Qd R 459 at 474-475 and 476-477, *R v McCullough* [1982] Tas R 43 at 56-57 and *R v Whitehorn* (1983) 152 CLR 657 at 663-654 per Deane J.

<sup>6</sup> See the discussion in Part 4 of Chapter 4.

<sup>7</sup> See, for example, *R v Holden* (1838) 8 Car & P 606, *R v Bull* (1839) 9 Car & P 22, *R v Lucas* [1973] VR 693, *R v Apostilides* (1984) 154 CLR 563, *R v Witts & Witts* [1991] Crim LR 562, *R v Shaw* (1991) 57 A Crim R 425, *R v Russell-Jones* [1995] 3 All ER 239 and *R v Dyers* (2002) 210 CLR 285. This is an involved issue in itself and will be pursued in Chapters 7-10. See, in particular, the discussion in Chapter 10.

<sup>8</sup> Various expressions are often used to describe information in the prosecution's possession. I will use the term "evidence" to refer to the material that the prosecution will adduce as part of its case and "unused material" to refer to all the remaining information and material that the prosecution has seen or collected and does not form part of the Crown case at trial, see Auld, Ch 2, n 333, Ch 10 at [115].

the prosecution case. It is this second duty, the duty of disclosure and its development in England and Australia, which will be the focus of this Chapter.

[5.1.3] The whole question of disclosure clearly reveals the tension between the dual roles of the prosecutor, as an active advocate in an adversarial system and as the minister of justice.<sup>9</sup> This tension arises with many of the prosecutor’s functions but is particularly evident with respect to the prosecutor’s crucial role in disclosing relevant material in its possession to the defence. As an adversarial advocate the prosecution lawyer at the expense of upholding or promoting justice might consider that his or her paramount role is to secure the conviction of the accused and therefore question or doubt the need to assist the accused by giving him or her sight of the prosecution’s intended evidence or any unused material that may undermine the prosecution case.<sup>10</sup> In addition there may well be an inclination for the prosecution to regard the material in its possession as the “fruits of the investigation” and not something that should be shared with the defence.<sup>11</sup> There are concerns that disclosure could lead the accused to “tailor” or “concoct” his or her defence to fit the disclosed prosecution material.<sup>12</sup> There are also significant concerns that disclosure might expose prosecution witnesses to intimidation or coercion to retract their accounts or change their testimony to assist the defence.<sup>13</sup>

[5.1.4] The proposition that the prosecutor is expected to reveal any material in its possession that undermines the prosecution case, especially where there is no corresponding obligation on the defence to do so, is one that fits uneasily within an adversarial criminal process.<sup>14</sup> Though the rationale of the adversarial system is to discover the truth,<sup>15</sup> in reality it is well known that the adversarial criminal trial boils

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<sup>9</sup> Indeed, a similar and longstanding tension can also be identified in the prosecution’s choice of its witnesses to be called at trial. See further the discussion in Part 1 of Chapter 7.

<sup>10</sup> See, for example, Kuo, K, and Taylor, C, “In Prosecutors We Trust: UK Lessons for Illinois Disclosure” (2007) 38 Loyola Uni Chi L Jour 695 at 706. See further the discussion in Parts 3 and 4 of Chapter 6. Such an “adversarial” view has certainly been held in the past by some parts of the prosecution. Such cases as *R v Ward* [1993] 1 WLR 619 and *R v Mallard* (2005) 224 CLR 125 provide examples of such an attitude. See also the references below in n 13. Not only have various commentators in England speculated that the police even to this day retain such a hostile mindset to disclosure, (see Samuels, A, “Disclosure” (2000) 164 JPN 64) but even senior police officers can be found expressing such a view, see Evans, J, “Miscarriages of Justice – a Police Perspective” (1993) 55 Police Journal 9: “Nothing has been so ill conceived in the development of the criminal law of late as the matter of disclosure...There is no justification for the current wide ranging ‘fishing expedition’ and no logical argument that the prosecution should disclose whatever information or evidence it has, whether material or not, used or not, which does not apply equally to the defence.” Evans’ view should be contrasted with that of Pollard, another police officer, see Chapter 6 at [6.4.1.2].

<sup>11</sup> See *R v Stinchcombe* (1991) 68 CCC (3d) 1 at 7.

<sup>12</sup> See, for example, *Petition of Di Joseph* (1958) 349 Pa 19 at 28-31 per Bell J for a vigorous expression of this fear. This argument was unsuccessfully raised against the imposition of any prosecution duty of disclosure in *R v Stinchcombe* (1991) 68 CCC (3d) 1 and even as late as 2004 in Australia, see *R v Reardon* (2004) 146 A Crim R 475 at 489-490.

<sup>13</sup> See *R v Connor* (1845) 1 Cox CC 233, *R v Duffy, O’Connell & Ors* (1847) 1 Cox CC 386 at 389 and *Maddison v Goldrick* [1975] 1 NSWLR 557 at 567. Some of these fears, notably, in relation to the fear of witness intimidation, are not without substance. Witness intimidation remains a major problem in the modern criminal process, see the vivid accounts in *R v Berry* [1992] 2 AC 364 and *R v Davis & Ors* [2006] EWCA 1155 as to the extent of this problem.

<sup>14</sup> See Frank, Ch 2, n 306, 247-248.

<sup>15</sup> See the discussion in Part 9 of Chapter 2 at [2.9.2].

down to a simple contest. "Who has the better case will 'win'."<sup>16</sup> The issue of disclosure in such an adversarial process is, as Sieghart observes, difficult to reconcile with the prosecutorial role as a minister of justice: "Inevitably, this places the prosecuting agent in a situation where he will be tempted to look as hard as he can for all factors pointing to guilt, and to minimize or even dismiss all other factors which may point to innocence."<sup>17</sup>

[5.1.5] It is far from unknown, even to the present day, to find prosecution counsel succumbing to adversarial temptation and adopting a partisan approach and either not to adduce relevant but unhelpful (to the prosecution) evidence at trial and/or to fail to disclose (and even suppress) relevant material to the defence and the court. As this Chapter will show if prosecution counsel should follow such an approach it is all too easy, as many cases demonstrate, for him or her not to "act as a minister of justice, but as a minister of injustice."<sup>18</sup>

[5.1.6] The prosecuting lawyer is entitled to act as an active advocate within an adversarial system,<sup>19</sup> but there are strict limits to the prosecutor's ability to act in this role. Even when acting as an advocate the prosecutor's overriding duty remains the attainment of justice and the paramount role always remains that of a minister of justice.<sup>20</sup> Whether this tension in prosecutorial roles in general terms can ever be entirely reconciled is, as argued in the last Chapter, debatable. It is even more unlikely that the tension in prosecutorial roles can ever be satisfactorily reconciled in the context of the prosecution's duty of disclosure of relevant material.<sup>21</sup>

[5.1.7] As will be discussed in Chapters 5 and 6 (disclosure) and 8, 9 and 10 (calling witnesses), while the notion that the prosecution should call witnesses at trial regardless of their value or benefit to the prosecution case, and the need for frank and fair disclosure of its case to the defence has gained renewed vigour over recent years, even historical prosecutors were aware of the implications of their actions in these areas. The Tasmanian Attorney-General in 1843 in *R v Sparks and Campbell*,<sup>22</sup> demonstrating an awareness of

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<sup>16</sup> Sieghart, P, "A View from JUSTICE" in Williams, Ch 1, n 176, 95 at 100.

<sup>17</sup> *Ibid.*

<sup>18</sup> Beard, A, "DA Will be Disbarred," *Chicago Sun Times*, 17 June 2007. This description was used by counsel for the North Carolina Bar Association in disciplinary proceedings brought against a District Attorney called Nifong arising from Nifong's high profile prosecution in 2006 of three white college students for the alleged rape of a black woman. Nifong was found to not only have knowingly concealed from the defence exculpatory DNA evidence that exonerated the defendants but to have lied when he denied in court that he knew about such evidence. Nifong was facing re-election and it seems that both his high profile prosecution of the students and his concealment of the crucial evidence that undermined his case were designed to boost his profile and enhance his prospect of re-election, see Wilson, D, "Prosecutor in Duke Case is Disbarred for Ethics Breaches," *New York Times*, 16 June 2007. Such prosecution non-disclosure as committed by Nifong is far from unusual in the United States, see Kuo and Taylor, above n 10, 704-707. See further the references cited in Chapter 6, n 43.

<sup>19</sup> See *R v Savion* (1980) 52 CCC (2d) 276 at 289 and *R v Cook* (1997) 146 DLR (4th) 437 at 446. See the further discussion in Part 7 of Chapter 4.

<sup>20</sup> See *R v McCullough* [1982] Tas R 43 at 57 and *R v Parsons & Stocker* (2004) 145 A Crim R 519 at 543. See further the discussion in Part 9 of Chapter 4 at [4.9.1]-[4.9.2].

<sup>21</sup> Burke, Ch 1, n 48, 1448. See further the discussion in Parts 4 and 6 of Chapter 6.

<sup>22</sup> *Hobart Town Courier*, 4 August 1843, p 4; *Hobart Town Advertiser*, 28 July 1843 and *Colonial Times*, 1 August 1843, p 3. See the earlier discussion of this case in Part 3 of Chapter 3 at [3.3.6].

his role as a minister of justice that was not always shared in practice by colonial prosecutors of the period,<sup>23</sup> was at pains to ensure that both the jury and the defence were not kept “in the dark” as regards any material witness or other evidence in respect of the murder of the overseer at Point Puer with which the two accused were charged.<sup>24</sup> However, as will be seen in Chapter 5 and 6 (disclosure) and 8, 9 and 10 (calling witnesses) other prosecution counsel have not proved to be as devoted to candour and fairness as the Attorney-General in *Sparks and Campbell* and in relation to such issues have acted as the adversarial or partisan advocate failing to disclose significant material and/or call material witnesses that undermined the prosecution case or supported the defence case. It has not been uncommon, especially historically, for prosecution counsel to assume a partisan role similar to that of prosecution counsel in *Livingstone* and to have approached the question of disclosure as some “sort of tactical tit for tat or a game of Happy Families.”

[5.1.8] As *Sparks and Campbell* suggests the tension in the prosecutor’s dual roles of adversarial advocate and minister of justice with respect to disclosure is not a recent development. Where disclosure is concerned the courts and the criminal process have sought, not always successfully, to reconcile the tension in the prosecutorial roles in a variety of ways. In respect of the disclosure of the prosecution case it is striking how the law has undergone a complete transformation. The law has evolved from the stage where the prosecution was entitled to assume a partisan role and resort to trial by ambush and was subject to an almost non-existent duty of disclosure. The law has moved in recent years from the informal “Old Boys Act” that, whilst requiring prosecution to furnish to the defence the evidence upon which it was proposing to rely, largely left the disclosure of unused material in its possession to unwritten etiquette and personal practice. In recent years a comprehensive duty of disclosure has become firmly established in both England and Australia that extends to any relevant unused material and arguably even to material held by a third party in the proceedings. This far reaching duty of disclosure is, as Chapter 6 will discuss, not without its problems of both principle and practice. The modern experiences of disclosure in England and Australia may be different. However, despite these differences and the problems that have arisen, one fundamental proposition is clear. The prosecutor may act in an adversarial process but in both Australia and England the prosecutor, whilst arguably possessing more latitude in his or her choice of witnesses at trial,<sup>25</sup> must never lose sight of his or her paramount duty as a minister of justice in performing the crucial function of disclosing relevant material to the defence.

## **Part 2: Developments in Disclosure 1554 to 1900: From Nothing to Something**

Disclosure of the prosecution case to the defence is now an established feature of criminal trials in this country. No-one now seriously disputes the proposition, that

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<sup>23</sup> See the discussion in Part 5 of Chapter 3.

<sup>24</sup> The Attorney’s approach should be contrasted with that adopted in *R v O’Farrell*, see further the discussion in Part 3 of this Chapter.

<sup>25</sup> See further the discussion in Chapters 7 and 10.

where allegations of a criminal nature are made against an individual, the accused person is entitled to know the substance of the case against him in advance of trial.<sup>26</sup>

[5.2.1] Though this proposition may now appear self-evident and unobjectionable it is crucial to note that the entitlement of the accused to know the details of the prosecution case against him or her is a comparatively recent development in the common law. Indeed, in respect of the entitlement of an accused to unused material that may be probative, the insistence of the common law on frank and full disclosure is, especially in Australia,<sup>27</sup> an extremely recent development.

[5.2.2] The common law was traditionally implacably opposed to the notion that an accused should be permitted to know in advance of trial the details of the prosecution case he or she would have to face.<sup>28</sup> Discovery had no place in a criminal trial.<sup>29</sup> It was perfectly proper for the prosecution to adopt a partisan approach and "ambush" the accused at trial. The accused was not even permitted to know the prosecution witnesses who would be called at trial or to sight of the indictment to know the precise charges that he or she would face. The decision to keep the accused in a such state of ignorance was not a ploy to guarantee a successful prosecution, "though this may have been the outcome in many instances,"<sup>30</sup> but rather was motivated by the firmly held view of the period that the truth of the case and the "right" verdict would be best determined if the accused were confronted with the evidence only when in the courtroom at trial.<sup>31</sup> As was explained by Judge Learned Hand of the Supreme Court of New York in 1923 in *United States v Garsson*<sup>32</sup> in the following robust terms:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defence. He is immune from question or comment on his silence; he cannot be convicted when there is any fair doubt in the minds of any of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defence fairly or foully, I have never been able to see...Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic

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<sup>26</sup> Baldwin, J, "Advance Disclosure: Problems Arising" (1988) 152 JPN 259.

<sup>27</sup> Arguably this was not definitively confirmed until the recent decision of the High Court in *R v Mallard* (2005) 224 CLR 125, see further Part 7 of this Chapter and Plater, D, "The Development of the Prosecutor's Role in England and Australia with Respect to Disclosure: Partisan Advocate or Minister of Justice?" (2006) 25 UTas L Rev 111 at 152.

<sup>28</sup> Traynor, R, "Ground Lost and Found in Criminal Discovery in England" (1969) 39 NYUL Rev 749 at 751. Indeed, Traynor traces this prohibition back to as early as 1554, see *Ibid*.

<sup>29</sup> *Montague v Dudman* (1751) 2 Ves Sen 396, *R v Hamiguchi* [1908] Qd SR 224 and *Sobh v Commissioner of Police* (1993) 65 A Crim R 466. See further the historical review in *Sobh* (1983) 65 A Crim R 466 at 467-475 per Brooking J.

<sup>30</sup> Taylor, Ch 2, n 130, 112.

<sup>31</sup> *Ibid*.

<sup>32</sup> (1923) 291 Fed 646.

formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.<sup>33</sup>

[5.2.3] The only modest concession in terms of disclosure was that conferred by the *Treasons Acts* of 1695 and 1707. These provisions allowed defendants facing charges of high treason to a copy of the indictment and the names and details, though not the anticipated evidence, of the prosecution witnesses. The measure of disclosure granted by the *Treason Acts*, modest as they may appear to a contemporary observer, represented a radical departure from the prevailing wisdom of the period. These concessions were not motivated by any sense of altruism by Parliament but rather by a certain vested self-interest on the part of its members. As Stephen commented:

This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experiences of the state trials held under the Stuarts, it did not occur to the legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let them know even what the names of the witnesses was so great a favour that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of parliament that trials for political offences should not be grossly unfair, but they were comparatively indifferent as to the fate of people accused of sheep-stealing, or burglary, or murder.<sup>34</sup>

[5.2.4] The case of *R v Holland*<sup>35</sup> in 1792 starkly illustrates the common law position at this time. The accused faced charges of corruption and public maladministration while holding “a position of great trust and importance under the East India Company.”<sup>36</sup> A report of a Board of Enquiry in India into the conduct of the accused essentially formed the prosecution case. The defence were unaware of the contents of the report and they sought an order of the court, either as a legal right or in the discretion of the court, to allow inspection of the report in order to prepare for the trial.<sup>37</sup>

[5.2.5] The prosecuting counsel, the Attorney-General, vigorously opposed the defence application:

There never was yet an instance of such an application as the present, to give the defendant an opportunity of inspecting the evidence intended to be produced against him upon a public prosecution. It would lead to the most mischievous consequences.<sup>38</sup>

[5.2.6] The court shared these concerns. Lord Kenyon CJ observed:

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<sup>33</sup> (1923) 291 Fed 646 at 649. See further the discussion in a modern context in Part 10 of Chapter 6 of pre-trial disclosure “undermining” the effective prosecution of crime.

<sup>34</sup> Stephen, Ch 2, n 3, 226.

<sup>35</sup> (1792) 4 TR 691.

<sup>36</sup> (1792) 4 TR 691.

<sup>37</sup> This application when viewed through modern eyes seems perfectly legitimate. How else could the accused even begin to prepare his defence and decide what witnesses to bring over from India without sight of the report? One must also note the not inconsiderable cost and risks in 1792 of bringing a potential witness all the way to England from India.

<sup>38</sup> (1792) 4 TR 691.

I am extremely clear that we ought not to grant this application. There is no principle or precedent to warrant it. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law.<sup>39</sup>

[5.2.7] The other members of the court agreed.<sup>40</sup> There was no basis under statute or common law, either as a legal right or a matter of discretion, for an accused to have access to the evidence on which the prosecution case was founded until the very hour of trial. Grose J considered that anything else "would be dangerous in the extreme, and totally unfounded on precedent."<sup>41</sup> Ashhurst J declared that he "should be sorry if such a rule were to be laid down in any case."<sup>42</sup>

[5.2.8] Though *Holland* is now largely forgotten, in England at least,<sup>43</sup> it was to cast a baleful light over this branch of the law for the better part of the following two centuries. The prosecutor may have been increasingly cast as a minister of justice as opposed to a partisan advocate, but that role did not, for a long time, find expression in any requirement to furnish the accused with its intended evidence, let alone any significant unused material.<sup>44</sup> In relation to disclosure at least, the prosecutor was still entitled at this time to act as a partisan advocate and the whole notion of trial by ambush was considered both unobjectionable and perfectly normal.

[5.2.9] This proposition was increasingly challenged in the 1800s. As Stephen notes there was a "growing sense of unfairness" at the "gross injustice" that denied accused persons access to the evidence against them.<sup>45</sup> The "fundamental defect" (as described by Hostettler)<sup>46</sup> in the criminal process of the early 1800s was not the lack of any right of defence counsel to address the jury and participate in the trial on the same terms as prosecution counsel,<sup>47</sup> but rather the inability of the accused to face the prosecution on anything approaching equal terms owing to the accused being denied until trial any knowledge of the prosecution case against him or her. As was observed by Charles Law, the Recorder of London, in the debates preceding the *Prisoners' Counsel Act*:

My Opinion is, that to give the Prisoner a fairer and fuller Opportunity of defence you would not resort so much to the Speeches of Counsel as affording him facilities before

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<sup>39</sup> (1792) 4 TR 691 at 692.

<sup>40</sup> Ashurst, Grose and Buller JJ.

<sup>41</sup> (1792) 4 TR 691 at 694.

<sup>42</sup> (1792) 4 TR 691 at 693.

<sup>43</sup> Interestingly, such landmark cases in England on disclosure as *R v McGuire* [1992] 1 QB 936, *R v Ward* [1993] 1 WLR 619 and *R v Keane* [1994] 2 All ER 478 make no mention of the decision. Similarly, the leading textbooks in England on the issue such as by Niblett (see Niblett, J, *Disclosure in Criminal Proceedings* (London, Sweet & Maxwell, 1996)) and Corker (Corker, D, *Disclosure in Criminal Proceedings* (London, Blackstone Press Ltd, 1997)) make no mention of the decision. I am grateful to Richard Lomax of the Crown Prosecution Service in London for originally drawing my attention to this case.

<sup>44</sup> See *R v Sheridan* (1811) 31 St Tr 544 at 545 and 557; *R v Thurtel* (*The Times*, 31 October and 5 December 1823) (quoted by Stephen, Ch 2, n 3, 227-228) and *R v Duffy* (1847) 1 Cox CC 367 at 369.

<sup>45</sup> Stephen, Ch 2, n 3, 228.

<sup>46</sup> See Hostettler, Ch 2, n 121, 148. See further the discussion in Part 10 of Chapter 2.

<sup>47</sup> Though this was still a significant factor in explaining the emergence of the prosecutorial duty of restraint, see the discussion in Part 6 of Chapter 2.

the Trial of distinctly understanding the Sort of Charge made against him. I think the Depositions taken before the Magistrates should be delivered to him (they are in the hands of the Prosecution) and a Copy of the Indictment. I think that every means of thoroughly understanding and meeting the Charge should be given to the Prisoner, and that on the Trial he should be put on a Perfect Equality with the prosecutor.<sup>48</sup>

[5.2.10] In order to allay this disadvantage to the accused there developed a rule of practice encouraging, if not requiring, the prosecution to call at trial any witnesses named on the “back of the indictment,” whether such a witness assisted the prosecution case or not.<sup>49</sup> Indeed, in some cases this obligation was even extended to witnesses present at the events in question who were not even named on the back of the indictment and who were positively hostile to the prosecution case.<sup>50</sup> There were occasional examples of prosecution counsel been at pains to act as a minister of justice and to ensure that all the facts, whether helping or hindering the prosecution case, were either adduced at trial and/or supplied to the defence.<sup>51</sup> The courts in England became increasingly wary of the notion that it was permissible for the prosecution to “ambush” the accused at trial by introducing evidence of which the defence were unaware.<sup>52</sup> There were occasional judicial comments encouraging or conferring some entitlement of disclosure to an accused.<sup>53</sup> Bentley notes the case of *R v Pook*<sup>54</sup> in 1871 where he asserts that Lord Cockburn CJ took the remarkably bold step for the time of insisting that the prosecution ensure that the defence were provided with all the information that was available and in the possession of the police.<sup>55</sup>

[5.2.11] It is important to bear in mind, however, the strict limitations of these no doubt well intentioned efforts at alleviating the disadvantageous position of the accused in the criminal process. Despite the development of the role of the prosecutor as a minister of justice it is clear that, in relation to questions of disclosure at least, the practical impact of such a role was limited in the nineteenth century. There was no entitlement to disclosure of even the evidence, let alone unused material of significance, in a summary case where “trial by ambush” was to remain routine until at least the 1980s.<sup>56</sup> Similarly, in respect of

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<sup>48</sup> See Cairns, Ch 2, n 43, 107.

<sup>49</sup> See *R v Bull* (1839) 9 Car & P 22 and *R v Carpenter* (1844) 1 Cox CC 72. See further the discussion Part 3 of Chapter 7. The notion of calling witnesses “named on the back of the indictment” is discussed in Chapter 7, n 12.

<sup>50</sup> See *R v Holden* (1838) 8 Car & P 606 and *R v Stroner* (1845) 1 Car & Kir 650. See also Part 3 of Chapter 7.

<sup>51</sup> See, for example, *R v Cunningham*, Central Criminal Court, 11 January 1797, No 17970111-5 and *R v Sparks & Campbell*, *Hobart Town Courier*, 4 August 1843, p 4; *Hobart Town Advertiser*, 28 July 1843 and *Colonial Times*, 1 August 1843, p 3.

<sup>52</sup> See the comments of Willes J in connection with *R v Greenslade* (1870) 11 Cox CC 412 at 413, n (a).

<sup>53</sup> See *R v Harrie* (1833) 6 Car & P 105, *R v Spry and Dore* (1848) 3 Cox CC 221, *R v Calucci* (1861) 3 F & F 103 and *R v Beaney* (1866) 3 W W & a’B (L) 69.

<sup>54</sup> *The Times*, 8 June 1871.

<sup>55</sup> Bentley, Ch 2, n 158, 40. My scrutiny of both *The Times* and the transcript of the actual trial do not bear out this interpretation of *Pook*.

<sup>56</sup> See Spencer, Ch 1, n 190, 247. This also emerges from the decision of the Court of Appeal in Queensland in *O’Shea v Bandiera* (1968) 62 QJPR 138 which noted that over the previous century and a quarter there had been no case throughout the Commonwealth in which the defence had been held to be entitled to the statements of the prosecution witnesses in a summary case. See also Napley, D, “Counsel, Preparation for Trial and Pre-Trial Procedure” in “A Criminal Case in England” (1971) 10 Am Crim L Rev 276 at 281-282. In *R v Franklyn* [1993] 1



indictable cases the entitlement of the accused to knowledge of material in the hands of the prosecution remained strictly limited. It is especially notable that neither *R v Pook* nor even the rule that the prosecution must call all the witnesses at a trial regardless of their value to the prosecution case gained a lasting hold. As Bentley notes, "Neither doctrine took root and by 1900 the law still imposed no duty on the prosecution or police to disclose information in their possession helpful to the defence case."<sup>57</sup>

[5.2.12] A fundamental inroad into the common law position as stated in *Holland* was achieved, not as a result of judicial development, but by the *Prisoners Counsel Act* 1836 and the *Indictable Offences Act* 1848<sup>58</sup> which gave the accused the welcome right to inspect and copy the depositions of the prosecution witnesses taken at committal.<sup>59</sup> After some initial equivocation,<sup>60</sup> the courts demonstrated that they were unwilling to allow the new provisions to be evaded by an unscrupulous or especially adversarial prosecutor who might still seek to "ambush" the defence at trial by withholding the most important witnesses at committal and obtaining a committal on the barest minimum of testimony and then only introducing the evidence of the withheld witnesses at trial. Though the courts were unwilling to subscribe to the robust proposition that the "new" evidence would be automatically excluded,<sup>61</sup> they expressed their strong encouragement to the prosecutor to serve on the defence prior to trial both the details of any witness who had not given a deposition and their expected evidence.<sup>62</sup> If the prosecution, despite such encouragement, still sought to introduce at trial evidence that had not previously been furnished to the defence, then the defence were entitled to an adjournment of the trial in order to deal with the new evidence.<sup>63</sup>

[5.2.13] By 1900 the notion of trial by ambush in cases to be tried on indictment was simply no longer acceptable. The prosecutor was no longer permitted to act as an adversarial or partisan advocate in relation to the evidence that it was proposing to

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WLR 852 the Privy Council confirmed this lack of entitlement in summary cases. In practice now, at least in England, professional guidelines provide for the routine disclosure in summary cases prior to trial of the evidence of the prosecution witnesses, see the discussion in *R v Bromley Magistrates' Court, ex parte Smith* [1995] 4 All ER 146 and the *Attorney-General's Guidelines on Disclosure 2000*. See also below n 198.

<sup>57</sup> Bentley, Ch 2, n 158, 40.

<sup>58</sup> Also known as "Sir John Jervis's Act" to reflect his role in its passage.

<sup>59</sup> Previously, the Magistrates had not been compelled to permit the accused to be present during the taking of the depositions (as happened in *R v Thurtel*, *The Times*, 31 October and 5 December 1823). Even if the accused were present only a small number ended up with any note of the proceedings as many were illiterate and almost all lacked any form of legal representation, see Bentley, Ch 2, n 158, 36. It is unsurprising that the right conferred by the *Prisoners Counsel Act* allowing the defence access to the depositions constituting the prosecution case was described by Stephen J in *R v Alderson* [1840] NSWSupC 37 (*Sydney Herald*, 3 August 1840) "as a more important part of the Act than even allowing the prisoner counsel."

<sup>60</sup> *R v Connor* (1845) 1 Cox CC 233 and *R v Ward* (1848) 2 C & K 759.

<sup>61</sup> An explicit statement to this effect attributable to Willes J appears in the report to *R v Stiginani* (1867) 10 Cox CC 552. However, this was not followed in *R v Greenslade* (1870) 11 Cox CC 412 as the views of Willes J in *Stiginani* were explained to have been wrongly reported by the author of the report of *Stiginani*. One can only assume that the report writer in *Stiginani* lost his retainer to report for Cox's Criminal Cases!

<sup>62</sup> See *R v Greenslade* (1870) 11 Cox CC 412 per Brett J and 413, n (a) per Willes J, *R v Brown* (1869) WW & AB 239 and *R v Smith* (1872) 11 SCR (NSW) 69 at 73.

<sup>63</sup> *R v Flanagan & Higgins* (1884) 15 Cox CC 403 and *R v Wright* (1934) 25 Cr App R 35.

adduce at trial. As was noted in 1882 at the Central Criminal Court in *R v Harris*, “Modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him.”<sup>64</sup>

[5.2.14] The prosecution’s duty of disclosure, nevertheless, remained limited. The accused in indictable cases remained in the profoundly unsatisfactory position of not knowing if the prosecution were in possession of unused material that could assist in showing his or her innocence and the complete lack in summary cases of any form of entitlement to disclosure remained.

### **Part 3: *R v O’Farrell*, The Dangers of no Duty of Disclosure: “a Miscarriage of Justice”**

[5.3.1] The dangers in the nineteenth century arising from the lack of any duty of disclosure, especially the almost total lack of any entitlement to what is now known as unused material, are well illustrated by the case of *R v O’Farrell*<sup>65</sup> in 1868. O’Farrell had attempted to assassinate Prince Alfred during his visit to Sydney. There were suggestions that O’Farrell had not acted alone but had been part of a plot by Irish Fenian terrorists resident in Australia. There was no dispute by defence counsel, Mr. Aspinall, that O’Farrell had committed the act. The sole issue at trial was one of insanity. As both O’Farrell’s background (he was a “mentally disturbed alcoholic”<sup>66</sup>) and a personal journal of his suggested, this was not a fanciful issue. The journal had been seized by the Colonial Secretary, Henry Parkes, who had assumed a leading role in the investigation into the affair and had accompanied the police on their search of O’Farrell’s rooms.<sup>67</sup> The journal was not adduced by the prosecution at trial.<sup>68</sup> Parkes chose to keep the journal to himself and neither its contents nor even its existence were ever revealed to either the defence or the jury.<sup>69</sup> Parkes even appears to have concealed the journal from his cabinet colleagues,<sup>70</sup> including the Premier and Attorney-General, James Martin,<sup>71</sup> who conducted

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<sup>64</sup> (1882) CCC Sec Pap xcv 525. See also the unreported case of *R v Hawkins* in 1896 referred to in the 31<sup>st</sup> edition of *Archbold*, see Butler, T, and Garsia, M, (eds), *Archbold Criminal Pleading, Evidence and Practice (31st edition)* (London, Sweet & Maxwell, 1943) p 471.

<sup>65</sup> See *The Age*, 6 April 1868, p 6, for a report of the trial. See further the earlier discussion of this case in Part 6 of Chapter 3 at [3.6.7], especially n 290.

<sup>66</sup> Travers, R, *The Grand Old Man of Australian Politics: The Life and Times of Sir Henry Parkes* (Kenshurst, Kangaroo Press, 1992) p 162.

<sup>67</sup> Parkes as the Colonial Secretary was the Minister in charge of the police and, as was not unknown for politicians such as Winston Churchill and Teddy Roosevelt during this period, even took an active part in direct police duties. After the shooting of the Prince, Parkes not only searched O’Farrell’s rooms but also traced his movements, questioned other lodgers and interrogated the prisoner at length, see *Ibid.* As Woods notes Parkes’ dubious actions in *R v O’Farrell* vindicate the modern convention against politicians intruding into particular police criminal investigations or prosecutions, see Woods, Ch 2, n 171, 235 and 243.

<sup>68</sup> As the issue at trial was one of insanity, rather than any terrorist plot, one can speculate that even if the Attorney-General had been in possession of the journal (which he does not appear to have been) it still may not have been produced in evidence or furnished to the defence, see Martin, Ch 3, n 284, 238.

<sup>69</sup> *Ibid.*

<sup>70</sup> Travers (1992), above n 66, 164.

<sup>71</sup> Travers (1986), Ch 2, n 57, 139.

the prosecution case at trial. Indeed, the journal was only to be released into the public domain some months later well after O'Farrell's trial and execution.<sup>72</sup>

[5.3.2] The significance of the journal should have been clear to Parkes (or anyone else with knowledge of it) as soon as the defence of insanity was raised, if not from the outset of the proceedings. Parkes was intimately acquainted with all the details of the case. As even a sympathetic biographer of Parkes acknowledged as early as 1896, "No other minister of the Crown, nor any public official, was in so good a position for knowing the whole of the circumstances connected with the crime."<sup>73</sup> Despite several arguably political references in the journal to the situation in Ireland, its bizarre contents were such that any reader of it would have entertained real doubts as to the rationality and sanity of the author. The *Freeman's Journal* stated that any medical practitioner would, after scrutiny of the document, "without any hesitation, declare the author as mad as a March hare, completely destitute of reasoning power."<sup>74</sup> Even the conservative *Weekly Mail* reached a similar conclusion. "The tone of the diary is incoherent, rambling, and in the style of a highly sensational French novel. It inevitably suggests doubts as to O'Farrell's sanity."<sup>75</sup> Woods asserts that "even brief reflection on the document as a whole would have led an objective mind to realise that the 'diary' was the ravings of a lunatic."<sup>76</sup> Such material was therefore not only relevant but would have been of considerable assistance to the defence of insanity at trial. Parkes cannot escape criticism for his role in the journal's suppression. His conduct in concealing such probative material is unjustifiable, whatever his initial views as to the circumstances behind the attack on Prince Alfred may have been.<sup>77</sup> As Travers observes:

In March [1868], the pages were recognised immediately by the wily Parkes as an invaluable aid to the prisoner's defence. They disappeared into his valise...it seems evident that his keen editorial eye caught some entries which might indicate a Fenian conspiracy. That same trained eye would not have missed the fact that these jottings were written amongst a jumble of clearly lunatic ravings. Yet this diary, which would have been of use to O'Farrell's family and lawyers in presenting a case for insanity was never shown to them. Parkes was not interested in such legal niceties...<sup>78</sup>

[5.3.3] Woods asserts that it was the non-disclosure of this plainly significant unused material that, as much as the other unsatisfactory aspects of the case,<sup>79</sup> rendered the trial

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<sup>72</sup> The journal and other papers relating to the case were removed by Parkes when he resigned as Colonial Secretary later in 1868 and a copy of them was only reluctantly released by him in December 1868 when the new Premier threatened him with police action, see Travers (1992), above n 66, 164-164 and Travers (1986), Ch 2, n 57, 138-39.

<sup>73</sup> Lyne, C, *Life of Sir Henry Parkes* (Sydney, George Robertson and Co, 1896) p 224.

<sup>74</sup> Quoted in Travers (1986), Ch 2, n 57, 141.

<sup>75</sup> Quoted in *Ibid.*

<sup>76</sup> Woods, Ch 2, n 171, 241.

<sup>77</sup> Parkes does seem, initially at least, to have genuinely believed that O'Farrell was part of a political plot by Irish Fenians, see Travers (1992), above n 66, 164. But it is clear he subsequently exploited the case for political gain, see Martin, Ch 3, n 284, 240-250.

<sup>78</sup> Travers (1986), Ch 2, n 57, 44.

<sup>79</sup> See Woods, Ch 2, n 171, 234-244, especially 240. The trial took place with almost indecent haste on 30 March 1868 in an atmosphere of popular outrage and intense and hostile press coverage. There had been little time for

and execution of O’Farrell a “miscarriage of justice.”<sup>80</sup> Though it was quite possible O’Farrell would still have been convicted regardless of whether the journal had been before the court,<sup>81</sup> Woods maintains that the material concealed by Parkes “strongly suggested” that O’Farrell should have been entitled to a verdict of not guilty by insanity and therefore spared the death penalty.<sup>82</sup> The conspicuous restraint shown at O’Farrell’s trial by the Attorney-General was wholly undermined by Parkes’ concealment of the journal.<sup>83</sup> The prosecution (using the expression in its wider sense) had acted in a manner at odds with any role as a minister of justice. One cannot disagree with Woods’ conclusion that in concealing the journal, “Morally, and possibly legally, Parkes perverted the course of justice.”<sup>84</sup> *O’Farrell*, as with similar cases that will be discussed later in this Chapter,<sup>85</sup> demonstrates the disastrous consequences that can arise through a partisan and “blinkered” prosecution approach to disclosure.

#### **Part 4: Developments in Disclosure 1900 – 1981: The “Old Boys Act” Approach**

...the public interest is involved. This the courts must keep in mind. They must also keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to believe that this duty is neglected; and if it ever should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution.<sup>86</sup>

[5.4.1] This observation was made by Lawton LJ in 1978. It will be noted that His Lordship was steadfast in his confidence that the prosecution were complying with their responsibilities as regards disclosure and that the courts would be vigilant in the

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the defence to prepare their case and seek and obtain evidence pertaining to O’Farrell’s state of mind and background. The trial judge’s summing up had been far from impartial. The prosecution did not call the prison doctor who could have testified as to O’Farrell’s state of mind (though, as will be considered in Chapter 7 it is by no means clear that on the law that then existed the prosecution should have called the doctor). O’Farrell was executed on 21 April 1868.

<sup>80</sup> *Ibid*, 242.

<sup>81</sup> Noting the strong feelings prompted by the attack on the Prince, see *Ibid*, 243.

<sup>82</sup> *Ibid*.

<sup>83</sup> See the discussion in Part 6 of Chapter 3 at [3.6.7].

<sup>84</sup> *Ibid*, 242. Though the critical reaction to Parkes’ suppression of the journal seems to have been motivated, not so much by the failure of the prosecution to have furnished it to either the defence or the jury in O’Farrell’s trial, but more by anger that the concealment of the diary had assisted in Parkes’ “witch hunt” (Travers (1986), Ch 2, n 57, 54), his efforts to play the sectarian card and to appeal to the Protestant anti-Irish vote in the Colony, see Woods, Ch 2, n 171, 242-43. Parkes had been still voicing dubious, if not unfounded, claims that the attack on the Prince had been part of a wider Fenian plot (what was to become known as the “Kiama Ghost”) when he had been in possession of material such as O’Farrell’s journal that clearly undermined such claims, see Travers (1986), Ch 2, n 57, 128-159. Parkes was never brought to account for his role in *O’Farrell* and later was to be acclaimed in Australia as the “Father of Federation,” see Woods, Ch 2, n 171, 243.

<sup>85</sup> See, for example, *R v Ward* [1993] 1 WLR 619, *R v Mallard* (2005) 224 CLR 125 and the cases listed below at n 123.

<sup>86</sup> *R v Hennessey & Ors* (1978) 68 Cr App R 419 at 426.

protection of the position of an accused and ensuring that the prosecution did not gain any unfair advantage. Unfortunately, as events would prove over a decade later, especially in England, this confidence was shown to be misplaced. In a number of celebrated, and not so celebrated, cases the arrangements governing disclosure were found to be painfully inadequate.

[5.4.2] Despite the passing reference by Lawton LJ that the prosecution should furnish "all relevant evidence of help to an accused," it is striking that during the period from 1900 to 1981 the formal arrangements or rules in respect of disclosure remained comparatively limited. In the decades after 1900 there was no sudden or dramatic extension to the prosecution's duty of disclosure in criminal cases. What developments did take place during this period, with the notable and often overlooked exception of *R v Nicholson*<sup>87</sup> in 1936, tended to be strictly limited in scope and imposed on a case by case basis.<sup>88</sup> The courts avoided, even in those comparatively rare instances where they did confer some measure of disclosure, considering or propounding any general or comprehensive duty of disclosure on the part of the prosecution and were at pains to emphasise when they did grant disclosure that they were not laying down any general rule.<sup>89</sup>

[5.4.3] *Nicholson* is a notable but usually overlooked exception. During the trial of a father for committing alleged sexual offences on his young daughter, the issue was raised whether the prosecution should call a medical witness whose expert report did not support the prosecution case. Hawk J held that the prosecution was entitled to decline to call the witness but expressed his approval of their action in supplying the unused medical report to the defence. His Lordship observed, "They must give to the defence the whole of the information they have got in their hands in case the defence should desire to use it, and so that no unfairness should be visited upon a defendant."<sup>90</sup> However, *Nicholson* despite its apparent significance in respect of not only the prosecution's duty of disclosure but its linked obligation in the calling of witnesses,<sup>91</sup> was ignored by both subsequent authority<sup>92</sup> and textbooks.<sup>93</sup> Its suggestion of a general duty of disclosure was not to be embraced for over a half century.

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<sup>87</sup> Unreported but a detailed discussion of it can be found at (1936) 9 JPN 553. This was a first instance decision by Hawk J. See also *R v Howick* [1970] Crim LR 403.

<sup>88</sup> For example the prosecutor's duty to furnish to the defence for the purpose of cross-examination a prior account of a prosecution witness that differed from his or her testimony at trial (see *R v Clarke* (1931) 22 Cr App R 58, *R v Bakash* [1958] AC 157 and *R v Gouldham* [1970] WAR 119) or the entitlement of the defence to receive the prior convictions of prosecution witnesses (see *R v Collister & Warhurst* (1955) 39 Cr App R 104).

<sup>89</sup> See *R v Hall* (1959) 43 Cr App R 29 and *R v Xinaris* (1958) 43 Cr App R 30, n. Even as late as 1990 this view was still being expressed, see *R v Wesley*, unreported, Supreme Court of Tasmania, 30 July 1990, No 27/1990, Transcript, p 8, per Zeeman J.

<sup>90</sup> (1936) 9 JPN 553.

<sup>91</sup> It is significant that Hawk J upheld the prosecution's refusal to call the expert who did not support its case. Explicit in His Lordship's reasoning is the proposition that if the defence know of an "unused" witness and their evidence, they rather than the prosecution should call them? See further the discussions in Part 6 of Chapter 7 of *Nicholson* in this context and of the wider question in Part 6 of Chapter 10 and Part 1 of Chapter 11.

<sup>92</sup> For example, though cited in argument in the leading case of *R v Bryant & Dickson* (1946) 31 Cr App R 146 no reference is made to *Nicholson* in the court's judgment.

[5.4.4] The nearest to any form of general guidance that did emerge during this period in either Australia or England is to be found in the influential decisions in *R v Bryant and Dickson*<sup>94</sup> in 1945, *Dallison v Caffery*<sup>95</sup> in 1964 and *Re: Van Beelen*<sup>96</sup> in 1974. These cases are not entirely satisfactory as they are difficult, if not impossible, to reconcile.<sup>97</sup> Broadly, they do not support the existence of any comprehensive duty of disclosure of unused material upon the prosecution. The suggestion to the contrary in *Nicholson* was overlooked. The prosecution were required to provide to the defence the name and contact details of any witness they did not propose to call. However, crucially, they were not required to furnish to the defence the statement of any such witness.<sup>98</sup> Such a limited obligation, as McCawley notes, “seems open to criticism.”<sup>99</sup> It would discourage candour on the part of the prosecution and enable it to conceal or suppress the statement of an unused witness and to employ it as the tactical situation might suggest. As McCawley observes, this limited obligation “would imply that the Crown is entitled to withhold a document and require the defence to guess at the contents and submit to the risk of being ambushed.”<sup>100</sup> Such a scenario seems, as subsequent events would demonstrate, not to be conducive to either a fair trial or the interests of the accused.

[5.4.5] The case of *R v Collier*<sup>101</sup> in 1958 illustrates the strictness with which the lack of the entitlement of an accused to knowledge of potentially probative material in the hands of the prosecution was enforced. The accused had been convicted of capital murder. The prosecution case was that the deceased was killed on or about 6 October. The accused asserted that a woman and a police officer had seen the victim still alive on 22 October. Neither witness was called by the prosecution at trial. The defence complained of this omission on appeal. The Court of Appeal disagreed. The duty of the prosecution was clear. The prosecution were not obliged to call the witnesses themselves.<sup>102</sup> If in their

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<sup>93</sup> See, for example, the fact that most successive editions of *Archbold* made no reference to *Nicholson*, though see 31<sup>st</sup> edition of *Archbold*, above n 64, 470-471.

<sup>94</sup> (1946) 31 Cr App R 146.

<sup>95</sup> [1964] 2 All ER 610.

<sup>96</sup> (1974) 9 SASR 163.

<sup>97</sup> See the acknowledgement in *R v Lawson* (1990) 90 Cr App R 107 at 114 and *R v Mason* [1975] 2 NZLR 289 at 294. Despite this confusion *Bryant & Dickson* and *Dallison v Caffery* can be taken as representing the starting point of the modern law of disclosure, see Niblett, above n 43, 30.

<sup>98</sup> Lord Denning MR. in *Dallison v Caffery* would have gone somewhat further than this and required the prosecution to either call or supply to the defence the statement of “a credible witness who can speak to material facts which tend to show the prisoner to be innocent” [1964] 2 All ER 610 at 618. The court in *Van Beelen* suggested that the prosecution need not furnish the statement of a material unused witness but in the case of a credible and material witness who went to the innocence of the accused, the Crown should either call that witness or provide his or her actual statement to the defence, see (1974) 9 SASR 163 at 248-250.

<sup>99</sup> McCawley, T, “The Production of Prior Statements of Prosecution Witnesses and Cross-Examination thereon in Criminal Cases” (1967) 61 QJP 73 at 77.

<sup>100</sup> *Ibid.*

<sup>101</sup> [1958] Crim LR 151. See further the discussion of this decision in Part 8 of Chapter 7 at [7.8.5].

<sup>102</sup> See also the discussion in Part 8 of Chapter 7. This role of the prosecutor in the calling of witnesses at trial reflects an “adversarial” role that confers a broad discretion on the prosecution in its choice of witnesses at trial. Such a role is supported by a long line of authority, see *R v Woodhead* (1847) 2 Car & Kir 520, *R v Edwards* (1848) 3 Cox CC 82, *R v Cassidy* (1858) 1 F & F 79, *El Dabbah v Attorney-General of Palestine* [1944] 2 All ER 139 and *R v Richardson* (1974) 131 CLR 116 but is contrary to the opposing approach noted above at n 7 that

investigations the prosecution discovered evidence they considered did not reveal the truth, they were not entitled to suppress it.<sup>103</sup> It was their duty, consistent with *Bryant and Dickson*, to provide the defence with the contact details of the witness but they were under no obligation to furnish the defence with any statement or account provided by that witness.

[5.4.6] It is instructive that the gravity of the charge in *Collier* and the apparently significant nature of the unused material in question still did not translate into any obligation on the part of the prosecution to furnish that material to the defence. *Collier* illustrates that questions of disclosure in a criminal trial are not just important, but can literally prove to be matters of life and death.<sup>104</sup> This point also emerges from the case of Giuseppe Maguire who died in prison in England while serving a lengthy sentence for terrorism offences of which he was later acquitted.<sup>105</sup> Prior to his death there had been vital unused material in existence and apparently known to the prosecution which had fatally undermined its case.<sup>106</sup> As O'Connor notes, "Perhaps there is no more moving reminder of the power that goes with the control of information. It can be a matter of life and death."<sup>107</sup>

[5.4.7] The comparatively modest formal requirements placed upon the prosecution and the conspicuous lack of any comprehensive judicial or statutory guidance as to the prosecutor's obligations of disclosure during the period in question raises the obvious question of how in practice this important function was carried out (or not carried out as the case may be). It would appear that, responding to the shortfall in the law, lawyers dealt with issues of disclosure on a personal and strictly informal basis. Typically, prosecutors would deal with questions of disclosure, not by recourse to statute or common law, but by reference to professional etiquette, their ethical duties and their personal relationship with the defence lawyer. There seems to have been a perception in judicial circles that the whole question of disclosure could be left to professional etiquette and personal ethics and the individual lawyers involved to resolve between themselves. The prosecutor was, after all, a minister of justice and could be trusted to ensure the fairness of the proceedings.<sup>108</sup>

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emphasises the prosecutor's minister of justice role. See further the discussion of the longstanding tension between these two views in Chapters 7-9.

<sup>103</sup> Cases of this period such as *R v Mattan* (1952 and not reported till a later referral to the Court of Appeal in 1998; *The Times*, 5 March 1998) and *R v Rowlands* (1947 and unreported but discussed in O'Connor, P, "Prosecution Disclosure: Principle, Practice and Justice" [1992] Crim LR 464 at 465) demonstrate how this all too easily could occur in practice.

<sup>104</sup> A number of defendants were all wrongly hanged for their alleged crimes, see further below n 123.

<sup>105</sup> See *R v Maguire* [1992] 1 QB 936.

<sup>106</sup> Maguire and his accomplices had been firmly linked to alleged IRA bomb making by scientific tests purporting to show positive results for traces of explosives. However, unbeknown to the defence, prosecution counsel and the jury, each "positive" swab for explosives had been subjected to a further and different test which had proved negative. This and other scientific material that discredited the damning expert evidence adduced at trial was never released despite defence requests for copies of the scientific records that were either ignored or refused. See further *R v Maguire* [1992] 1 QB 936 and O'Connor, above n 103, 467.

<sup>107</sup> *Ibid*, 467.

<sup>108</sup> Niblett, above n 43, 61 and Corker, above n 43, 24.

[5.4.8] Traynor in 1964 characterised this informal approach to disclosure in England as the “Old Boys Act” and in the United States as the “Nice Guys Act.”<sup>109</sup> Traynor described the operation of this approach in England in the following terms:

Whatever the formal restrictions on discovery, there is some relaxation on an informal basis under what the English characterize with bantering aptness as the ‘Old Boys Act.’ Though it is nowhere to be found in the statute books, and is far from equivalent to tradition with the force of custom, The ‘Old Boys Act’ is acted out frequently enough to give it the force of realistic practice, if not of law or custom. Given the high standards of the legal profession in England, most defense solicitors qualify as Old Boys. Then, but only as a professional courtesy, they may be allowed pretrial inspection of prosecution information about the accused that would not otherwise be available under established practices.<sup>110</sup>

[5.4.9] David Napley, a prominent English solicitor, in 1971 also drew attention to the informal system of disclosure that operated at that time which he termed the “Old Towels Act.”<sup>111</sup> Napley described that under the “Old Towels Act” a lawyer of “reasonable repute” could contact the prosecution solicitor or the office of the Director of Public Prosecutions and outside any formal avenue “you will get a great deal of help and assistance from them in a broad sort of way as to the nature and matter into which you are inquiring.”<sup>112</sup>

[5.4.10] A similar situation would appear to have existed in Australia. Lane, as late as 1981, was able to describe the Australian practice in relation to disclosure as follows:

The general approach of the Australian courts to the non-disclosure of exculpatory evidence is to leave it to the unguarded discretion of the prosecutor. Such an approach seems to be founded on the concept of the prosecutor as a ‘minister of justice’, who can be trusted to ensure that justice is done.<sup>113</sup>

[5.4.11] A similar description was provided in Victoria as late as 1985 by the Shorter Trials Committee:

The present disclosure position in Victoria is imprecise, uncertain and heavily reliant upon prosecution discretion and the strength of professional and personal relationships between individual prosecutors and defence counsel.<sup>114</sup>

[5.4.12] The efficacy of this informal disclosure regime depended heavily upon the practices of the individual prosecutor. An illustration of this was provided by Christmas Humphreys in 1955. Humphreys stressed the “duty of prosecuting counsel to assist the defence in every way” arising from their proper role as a minister of justice.<sup>115</sup>

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<sup>109</sup> Traynor, above n 28, 767.

<sup>110</sup> *Ibid.* The effectiveness of such an informal approach to disclosure is certainly open to considerable doubt.

<sup>111</sup> Napley, above n 56, 280. Though Napley claimed it was “a very old act of Parliament” the origin of this term is obscure.

<sup>112</sup> *Ibid.*

<sup>113</sup> Lane, B, “Fair Trial and the Adversary System: Withholding of Exculpatory Evidence by Prosecutors” in Basten, J, *et al* (eds), *The Criminal Injustice System* (Sydney, Australian Legal Workers Group (NSW), 1981) p 188.

<sup>114</sup> Shorter Trials Committee, Ch 4, n 19, 90.

<sup>115</sup> Humphreys, Ch 1, n 1,741.



Humphreys described how this influenced his personal practice in relation to disclosure in the following terms:

I have said that all the powers of the prosecution should be available for the defence. The same may be said to apply to information in their possession, although in this matter there is room for difference of opinion. There is always available to the Crown a mass of information, and much of it irrelevant to the issue and much that, though possibly relevant is wholly unreliable. How much of this that is not being used in the depositions and exhibits should be made available to the defence? *Generally speaking, any information which the prosecution does not intend to use, but which might, if believed, assist the defence, should be made available* [my emphasis].<sup>116</sup> The present custom in London is to inform the defence that a witness, giving the name and address, might be able to assist them. For myself, I take the view that a copy of the statement taken should be given to the defence, and I satisfy my own principles by handing a copy of it to defending counsel at the trial.<sup>117</sup>

[5.4.13] A similar assurance as to the scrupulously fair approach that was ostensibly applied during the informal regime was provided in 1959 by WB Common QC, the Ontario Director of Public Prosecutions, in respect of disclosure in Ontario:

To use a colloquialism, there are no 'fast ones' pulled by the Crown. The Defence does not have to disclose its defence to the Crown. We do not ask it for a full and complete disclosure of the case. If there are statements of witnesses, statements of accused, the defence is supplied with copies, that show exactly what our case is, and there is nothing hidden or kept back or suppressed so the accused person is taken by surprise at the trial by springing a surprise witness on him. In other words, I again emphasise the fact that every safeguard is provided by the Crown to ensure that an accused person, not only in capital cases, but in every case receives and is assured of a fair and legal trial.<sup>118</sup>

[5.4.14] The principled approach of both Humphreys and Common accords with the notion of the prosecutor as a minister of justice; astute to ensure that the defence were made aware of any significant or probative material in the prosecution's possession. Whatever the law in cases such as *Bryant and Dickson* and *Van Beelen* may have prescribed, Humphreys and Common saw the prosecutor's proper role as that of a minister of justice and therefore adopted a personal (in the case of Humphreys) or organisational (in the case of Common) approach to disclosure that exceeded the modest formal obligations cast upon the prosecution by decisions such as *Bryant and Dickson*.

[5.4.15] Unfortunately, the effectiveness of these informal arrangements for disclosure is open to considerable doubt. For all the laudable motivation of prosecutors such as Humphreys and Common, it became increasingly obvious that reliance on professional etiquette and ethical constraints arising from the prosecutor's position in the criminal process as a minister of justice did not achieve adequate disclosure for the accused. There

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<sup>116</sup> This highlighted portion of Humphreys' observations as to what should be furnished by way of what is now known as unused material, greatly exceeded the modest disclosure obligations of the time upon the prosecution. Indeed, with remarkable foresight this part of Humphreys' observations closely accords with the modern obligations on prosecutors in both England and Australia for the disclosure of unused material.

<sup>117</sup> Humphreys, Ch 1, n 1, 742. However, it is interesting to note that Humphreys had been the prosecution counsel in *Collier*, and begs the question whether he was always as generous in practice as his address in 1955 would indicate.

<sup>118</sup> Quoted by Wilson J in *R v Finland* (1959) 125 Can CC 190.

were two obvious and crucial flaws to the “Old Boys Act” approach to disclosure. Firstly, such a candid approach as suggested by Humphreys and Common was not necessarily shared or adopted by all prosecutors. Further individual prosecutors were inconsistent in their approach to disclosure, adopting one position in one case and a quite different position in another.<sup>119</sup> Secondly, it must be remembered that even the comparatively transparent approach advocated by Humphreys and Common was still crucially dependent upon the police or other investigators furnishing to the prosecuting lawyer any material gathered in the course of the investigation that might be of relevance at trial. Events would show that this might not always occur for the simple reason that the police had “little incentive and traditionally no obligation”<sup>120</sup> to reveal unhelpful material that did not accord with their theory of the guilt of the accused. Even the “totally ethical”<sup>121</sup> prosecutor could not disclose that which he or she did not know about.

[5.4.16] Despite the apparent recipe for uncertainty and inconsistency, for a long time there was widespread trust and faith in the fairness and impartiality of the informal “Old Boys Act” approach to disclosure. The courts, and even the defence, typically shared the confidence of Lawton LJ and trusted the prosecution to ensure that any significant material was not suppressed and any probative material was revealed to the defence.<sup>122</sup> Such trust, especially through modern eyes, may seem misguided, if not naïve. But it is apparent that there was widespread confidence in the prosecution lawyer. After all, he or she was a minister of justice and could be trusted to ensure that, to use Common’s colourful expression, “no fast one was pulled.”

[5.4.17] In practice, however, these informal and individual arrangements were not guaranteed to ensure a fair trial and to prevent a miscarriage of justice. Scrutiny of the experience of disclosure in England during this period highlights a disturbing number of instances in which significant material was withheld from the defence and defendants were later found to have been wrongly convicted.<sup>123</sup> These cases show a veritable

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<sup>119</sup> Especially if the defence lawyer were to prove unhelpful and chose “not to play ball.” As Epp notes, “A prosecutor would never again provide candid disclosure if a defence solicitor used that information in an overt way in court.” (see Epp, J, *Building on the Decade of Disclosure in Criminal Procedure* (London, Cavendish Publishing, 2001), p 49. Such a defence lawyer could not be categorised as one of the “Old Boys,” see further *Ibid*, 48-49.

<sup>120</sup> Findley, M, *et al*, *Australian Criminal Justice* (4<sup>th</sup> ed) (Melbourne, Oxford University Press, 2009), p 160.

<sup>121</sup> *Ibid*.

<sup>122</sup> See Corker, above n 43, 2; Niblett, above n 43, 61; Lane, above n 113, 188 and Corker, D, and Parkinson, S, *Disclosure in Criminal Proceedings* (Oxford, Oxford University Press, 2009) 2 at [1.03]-[1.04]. This trust in prosecution counsel even extended in 1972 in England to Lord Lane CJ expressing his opposition to a proposed statutory scheme of disclosure. Lord Lane noted that the judges he had consulted were unanimously of the view that such a scheme was inappropriate and there was no need for either legislation or practice direction, see Niblett, above n 43, 63.

<sup>123</sup> A detailed consideration of these various cases is not undertaken in this Thesis. Instead representative cases are examined in detail. This inglorious catalogue of cases includes *R v Rowland* (discussed at Connor, above n 103, 465-66) (hanged for murder); *R v Varig* (unreported but discussed in Epp, above n 119, 41); *R v Mattan*, *The Times*, 5 March 1998 (hanged for murder); *R v Kiszko* (the second successful appeal is formally unreported but see Niblett, above n 43, 21-22 and Horsnell, M, “Wrong Man Jailed for 1975 Killing,” *The Times*, 18 February 1992, p 5 and (1978) 68 Cr App R 62 for the first appeal) (16 years in prison for murder); *R v Ward* [1993] 1 WLR 619 (17 years in prison for alleged terrorist crimes); *R v Maguire & Ors* [1992] 1 QB 936 (seven accused sentenced to terms ranging from 4 to 14 years (one died in prison) for an alleged terrorist bomb factory); *R v Cooper & McMahon* [2003] EWCA Crim 2257 (both spent ten years in prison for murder); *R v Kelly & Connolly* [2003]

catalogue of non-disclosure that includes the apparently conscious and deliberate suppression by the prosecution of cogent, even crucial, material that undermined the prosecution case on a number of occasions.<sup>124</sup> It is arguable that these cases, far from being the isolated exception in sensational and high profile cases such as the IRA terrorist trials, are reflective of a wider police culture operating at this time and of entrenched opposition to the whole notion of full and frank disclosure.<sup>125</sup>

### **Part 5: *R v Ward*, "When Public Confidence in the British Criminal Justice System Reached its Nadir"**

[5.5.1] The fact that the police were found to suppress significant material was bad enough. However, even prosecution lawyers on occasion have not escaped adverse scrutiny through their adoption of a partisan position to disclosure.<sup>126</sup> The case of *Ward* is notable in this respect. *Ward* serves as a vivid illustration of the failings of the Old Boys Act approach to disclosure.

[5.5.2] *Ward* was convicted at trial in November 1974 of twelve counts of murder and three counts of causing an explosion likely to endanger life in relation to three of a series of IRA terrorist attacks.<sup>127</sup> *Ward* had repeatedly come to the attention of the authorities through her often outlandish claims of involvement in IRA circles. Nevertheless, the

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EWCA 2957 (Kelly was hanged for murder and Connolly spent six years in prison for other offences arising from the murder); *R v Kamara* [2000] EWCA Crim 37 (20 years in prison for murder) and *R v Paraskeva* (1983) 76 Cr App R 162. A common theme of these cases is the apparent "tunnel vision" of investigators and prosecutors, an inability to appreciate the real significance of unused material that rested uneasily with the apparent guilt of the suspect and an apparent willingness to discount it. Many of the "historical" miscarriage of justice cases in England have only belatedly come to light in the last decade as a result of the work of the Criminal Cases Review Commission (CCRC). Although "Innocence Projects" exist in several Australian jurisdictions such projects lack the resources and formal powers and/or years of operation of the CCRC, see further, Laurie, V, & Taylor, P, "Cost of Innocence," *The Australian*, 20 September 2006. If Australia was to ever adopt such a comprehensive agency as the CCRC perhaps a similar series of wrongful convictions as in England would come to light.

<sup>124</sup> *Kiszko* is a vivid example of apparent deliberate police non-disclosure. *Kiszko*, who had an intellectual disability, was convicted in relation to the sexual assault and brutal murder of a girl on the basis of questionable and later retracted admissions that he made in interview. However, crucial forensic evidence was withheld that actually showed *Kiszko*'s innocence. He spent 16 years in prison before his eventual release but died soon after, see further Niblett, above n 43, 21; Tibballs, G, *Legal Blunders* (London, Robinson, 2000) p 249-254 and Rose, J, *et al*, *Innocents: How Justice Failed Stefan Kiszko and Lesley Molseed* (London, Fourth Estate, 1997). As a postscript the real murderer was recently convicted, see McSmith, A, "Miscarriage of Justice corrected as jury finds man guilty of murder," *The Independent*, 13 November 2007 and Jenkins, R, "Conviction too late for victim of 'worst miscarriage of justice of all time'," *The Times*, 13 November 2007.

<sup>125</sup> See, for example, Sieghart, above n 16, 96-100 and O'Connor, above n 103.

<sup>126</sup> See *R v Kamara* [2000] EWCA Crim 37. The DPP's office was in possession of 201 statements marked as "non-material" that junior trial counsel had assessed were relevant and should be made available for inspection to the defence. The statements were never disclosed and were only "found" in 1998 by the CCRC. The Court of Appeal noted that it had been most regrettable they had not been supplied. The statements were relevant and several were crucial. The fault for their non-disclosure appeared to lie within the DPP's office. Though the court did not speculate as to the explanation for the non-disclosure it is unsurprising that defence counsel complained of the "massive non-disclosure at the trial" and the "many disturbing features of the case," see BBC News, "Murderer freed after 20 years," 30 March 2000. For a Canadian example, see *Re: Bledsoe and Law Society of British Columbia* (1985) 11 DLR (4<sup>th</sup>) 280.

<sup>127</sup> This was during a period when the IRA carried out a series of terrorist bombings in England.

prosecution case against her at trial had appeared formidable. It was asserted that traces of nitroglycerine had been found on Ward, her clothing and at a caravan where she had been staying that linked her to all three explosions. Crucially, and most damagingly, it was claimed that after the worst explosion traces of nitroglycerine had been found underneath her fingernails.<sup>128</sup> In addition to this apparently damning scientific evidence, Ward in interview to the police had admitted involvement in the three attacks and had further declared her identification and active involvement in the IRA cause. The defence at trial had sought, with little success, to challenge the prosecution scientific evidence.<sup>129</sup> The defence had also sought to impugn the reliability of Ward’s damaging admissions and boasts of involvement in the IRA on the basis of the sheer implausibility of her assorted claims and the various lies and inconsistencies in her assertions. Defence counsel branded his client a “female Walter Mitty” and asked if she was a “pathological liar” who was trying to gain notoriety and win a place in Irish folklore by making false admissions.<sup>130</sup> However, it was little surprise given the apparent strength of the prosecution case and the admittedly horrific nature of the crimes<sup>131</sup> that these exhortations were rejected by the jury and Ward was convicted of all counts.<sup>132</sup>

[5.5.3] Some 17 years later and with the benefit of fresh evidence adduced by the defence, it emerged during a challenge to Ward’s convictions in 1993 that the prosecution case was not as formidable as it must have appeared to the jury in 1974. This further evidence seriously undermined both the prosecution’s scientific evidence<sup>133</sup> and the reliability of Ward’s admissions in interview.<sup>134</sup> However, what also emerged during the appeal was the disquieting fact that the prosecution had withheld from disclosure, both before and at Ward’s trial in 1974, a considerable amount of significant unused material that had undermined both the scientific evidence and the reliability and strength of Ward’s admissions in interview. This non-disclosure extended to virtually all of those involved in the prosecution of the case; the West Yorkshire Police,<sup>135</sup> two psychiatrists called Dr

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<sup>128</sup> It was claimed that the traces of nitro glycerine allegedly found underneath Ward’s fingernails established that she had taken part in the making of the bombs and had not merely planted them.

<sup>129</sup> The Court of Appeal later noted the defence challenge to the “cogent” prosecution scientific evidence as “weak and implausible” [1993] 1 WLR 619 at 637.

<sup>130</sup> [1993] 1 WLR 619 at 638.

<sup>131</sup> One of the bombings that Ward had allegedly committed had been especially horrific. A bus carrying military personnel and their families had been the target of a terrorist bomb attack and twelve people had been killed and many others injured. This explosion gave rise to the twelve counts of murder faced by Ward.

<sup>132</sup> [1993] 1 WLR 619 at 664. It is also notable that Ward never appealed or challenged her convictions at the time, see further Ward’s own account of the trial and the aftermath, Ward, J, *Ambushed* (London, Vermilion, 1993).

<sup>133</sup> The defence adduced new evidence discrediting the prosecution’s scientific evidence, especially the damaging assertion that traces of nitro glycerine had been found under Ward’s fingernails.

<sup>134</sup> It was established that Ward was suffering in 1974 from a severe mental disorder that rendered utterly unreliable any of the admissions she had made.

<sup>135</sup> The police had only provided to the DPP 224 of the over 1700 statements that they had obtained during their investigation. It is unclear why this decision was made. The Court of Appeal speculated that it was perhaps borne out of a desire not to overburden the DPP with over 1700 statements. Though the “vast majority” of the withheld statements were irrelevant they included significant material that the defence should have had that supported the “Walter Mitty” defence or, as the court described, Ward’s “proclivities for attention seeking, fantasy and the making and withdrawal of untrue confessions” [1993] 1 WLR 619 at 650.

Lawson and Dr Mather who had examined Ward at the instructions of the prosecution,<sup>136</sup> the forensic scientists who had found the alleged traces of nitro glycerine<sup>137</sup> and lastly, but certainly not least, the office of the Director of Public Prosecutions and prosecution counsel.

[5.5.4] The less than frank role played by the prosecuting lawyers in *Ward* is deserving of particular scrutiny in the present context. Though prosecutors in 1974 were still operating according to the modest obligations of disclosure imposed by *Bryant and Dickson*, the Court of Appeal found that even this comparatively unexacting standard of disclosure had not been observed. The names and addresses of several witnesses were not furnished, despite at least one defence request for such information.<sup>138</sup> Furthermore, the prosecuting solicitor responsible for the preparation of the case for trial, a Mr. Bibby, had misinformed (unwittingly it would seem) the defence that a potential witness had never been traced by the police when the prosecution had two statements from that very witness.

[5.5.5] The Court of Appeal in 1993 was also concerned by the failure of the prosecution lawyers to have furnished to the defence material in their possession that went to the reliability of the various admissions made by Ward. The court noted that Mr. Bibby had failed to provide to the defence the medical reports of Dr Lawson and Dr Mather as to Ward's mental condition.<sup>139</sup> The court considered that these reports, even in their diluted

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<sup>136</sup> Whilst on remand Ward twice injured herself in apparent attempts at suicide, or at least self harm. Both Lawson and Mather in their formal reports to the DPP did not mention Ward's second effort at self harm. However, Dr Lawson, the prison psychiatrist, was greatly alarmed at Ward's mental condition. He noted in an internal report that was never disclosed to either the DPP or the defence: "The wound was trivial but the desire for death was acute... In short, she has an acute psychotic depression of rapid onset... Judith Ward is unfit to plead and it must be faced squarely, that her life is in some danger. In short we have an acute psychiatric emergency on our hands" [1993] 1 WLR 619 at 661. This concern was largely and conspicuously absent from the formal report he prepared for the DPP. The Court of Appeal did not accept the assertion of defence counsel in 1993 that Dr Lawson had "put the interests of secrecy and of security before the interests of the appellant who was his patient" [1993] 1 WLR 619 at 663. However, it is clear that the court regarded Lawson's account and role in the whole affair with some circumspection. The court was critical of the non-disclosure of significant material by both Lawson and Mather as Ward's mental state was clearly germane to the "Walter Mitty" defence [1993] 1 WLR 619 at 664.

<sup>137</sup> It emerged during the appeal that the disclosure of the scientific evidence at the original trial had been "lamentable" and "woefully deficient" [1993] 1 WLR 619 at 674. Several of the forensic scientists involved in the case "took the law into their own hands" and had deliberately concealed from prosecution counsel, the defence and the court a catalogue of material and tests within their possession or knowledge that greatly undermined their assertions against Ward, especially the damaging claim about traces of explosives under her fingernails [1993] 1 WLR 619 at 674. It was unclear that any nitro glycerine had ever actually been found. The purported "nitro glycerine" could have been an innocent substance such as boot polish (such misdiagnosed scientific evidence was also a prominent feature in the "McGuire Seven" case, see *R v Maguire* [1992] 1 QB 936). The Court of Appeal found that the forensic scientists had "plainly succumbed to the dangers of partisanship" and had "misled both the prosecution and the defence in order to promote a cause which they had made their own," namely that Ward had been in contact with nitro glycerine [1993] 1 WLR 619 at 675. The scientists had lost sight of their supposed scientific objectivity and had "come to see their function as helping the police" [1993] 1 WLR 619 at 674.

<sup>138</sup> The defence had even cited *R v Bryant & Dickson* in their letter.

<sup>139</sup> Though the court emphasised that this was not a case of their deliberate suppression by Mr. Bibby. Rather it seemed to be as a result of administrative oversight and the lack of any comprehensive system for recording the receipt and dispatch of such material [1993] 1 WLR 619 at 660-661. See further below n 153.

form,<sup>140</sup> were relevant and should have been furnished to the defence.<sup>141</sup> The court was especially struck with several interviews with Ward that had never been disclosed. These were significant. Some lent weight to the notion that Ward was a deluded “Walter Mitty” character and no credence could be attached to her claims of involvement in the IRA. Indeed the highly experienced police officer conducting one interview with Ward had dismissed her claims of gun-running for the IRA and had even volunteered at the end of his statement: “I formed the opinion that Miss Ward was not mentally stable and that she could be easily persuaded to do or say anything.”<sup>142</sup> This significant statement had also never been furnished to the defence.

[5.5.6] The Court of Appeal paid particular attention to a series of interviews that a Special Branch officer called Wilson had conducted with Ward on 15 February 1974. These interviews were comprehensive and in the opinion of the Court of Appeal were “plainly relevant to issues in the trial” and therefore were “plainly disclosable.”<sup>143</sup> However, they had not been disclosed beyond a guarded letter sent by Mr. Bibby to the defence in less than accurate terms:

I understand that there were interviews with the defendant and senior police officers on Friday 15 February concerning antecedent and certain peripheral matters, details of which I do not propose to adduce at the trial.<sup>144</sup>

[5.5.7] Mr. Bibby in cross-examination before the Court of Appeal conceded that the matters covered in the interviews were anything but “peripheral” and were “central to the issues in the case.”<sup>145</sup> This raises the obvious question as to why Mr. Bibby should write in such apparently misleading terms. It is significant that the Director of Public Prosecution waived legal professional privilege and revealed the written advice on this point provided by junior prosecution trial counsel, a Mr. Walsh. This read:

Will Mr. Bibby please write to the defendant’s solicitors to inform them...that he understands that there were interviews with the defendant generally about her antecedents and of a peripheral nature on 15<sup>th</sup> February 1974, the details of which the prosecution do not propose to adduce in evidence.<sup>146</sup>

It will be noted that Mr. Bibby had dutifully followed these instructions. The effect of this letter was to lead the defence to believe, wrongly as it turned out, that the interviews were of no relevance.<sup>147</sup>

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<sup>140</sup> These reports did not contain probative material relating to Ward’s mental condition.

<sup>141</sup> Even in their “edited” diluted form. In 1974 it was, and indeed remains, standard practice in any murder case that any psychiatric report obtained by the prosecution about the mental condition of an accused should be automatically furnished to the defence, see *R v Smith* (1910) 6 Cr App R 19 and *R v Casey* (1947) Cr App R 91.

<sup>142</sup> [1993] 1 WLR 619 at 654. This officer made the valid point to the Court of Appeal in 1993, as had also been raised by the defence at the original trial, that the IRA would not entrust a person of Ward’s obvious ineptness and questionable mental state with the responsibility of carrying out a major terrorist operation.

<sup>143</sup> [1993] 1 WLR 619 at 657.

<sup>144</sup> [1993] 1 WLR 619 at 657.

<sup>145</sup> [1993] 1 WLR 619 at 657.

<sup>146</sup> [1993] 1 WLR 619 at 657.

<sup>147</sup> See the account of the defence solicitor at the Court of Appeal [1993] 1 WLR 619 at 658.

[5.5.8] The apparent explanation for this less than frank approach was the prosecutors' desire to protect Wilson, the Special Branch officer.<sup>148</sup> The Court of Appeal accepted the legitimacy of these concerns but disagreed with the decision to withhold Wilson's interviews with Ward. "The motive was right. The decision was wrong."<sup>149</sup> The interviews could have been released in a form that would still have protected Wilson's interests.<sup>150</sup> The Court of Appeal was critical of the approach taken by Mr. Bibby and Mr. Walsh. The reference to the interviews in Mr. Bibby's letter had been in terms that could "only be described as misleading."<sup>151</sup> The Court of Appeal concluded:

It was wholly wrong for Mr. Walsh to draft, and for Mr. Bibby to adopt, the language of the letter...This letter seriously misrepresented the position. It was calculated to give the impression to the defence that the interviews were of no material significance and that is precisely what it did...The non-disclosure of the interviews of 15 February amounted to a material irregularity in the course of her trial.<sup>152</sup>

[5.5.9] It must be accepted that the prosecutors in *Ward* had, for whatever reason, not acted with the candour and transparency one might have expected of a minister of justice.<sup>153</sup> They certainly had not conformed to the elevated approach to disclosure urged by Humphreys and Common. However, *Ward* went far further. The revelation in 1993 of the extent and breadth of the spectacular catalogue of non-disclosure in *Ward* by all parts of the prosecution; represented, "a moment when public confidence in the British criminal justice system had reached its nadir."<sup>154</sup> *Ward* must serve as a strong indictment of the inadequacies of the informal "gentlemen's regime for disclosure and the limited formal obligations imposed by both statute and common law upon prosecutors. It was clear that after *Ward*, as will be discussed in the next part of this Chapter, that nothing would ever be the same again in relation to disclosure in England.

[5.5.10] Australia has experienced nowhere near the same number of identified historical cases of wrongful convictions due to non-disclosure as England,<sup>155</sup> but it is significant that

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<sup>148</sup> Both his personal safety and anti-terrorist activities could have been endangered had his role in the case been exposed.

<sup>149</sup> [1993] 1 WLR 619 at 658.

<sup>150</sup> As will be discussed in Part 11 of Chapter 6 the likely result now of a public interest immunity application in England to withhold the identity of a vulnerable officer such as Wilson would be to withhold those details whilst still revealing the interviews to the defence.

<sup>151</sup> [1993] 1 WLR 619 at 657.

<sup>152</sup> [1993] 1 WLR 619 at 658.

<sup>153</sup> Whilst there may be suspicions the Court of Appeal in *Ward* refrained, unlike with the scientists, from offering any view as to whether the non-disclosure by the prosecution lawyers was due to partisanship or administrative oversight.

<sup>154</sup> Niblett, above n 43, 33 at [3.24].

<sup>155</sup> It would be idle to pretend that the police and even prosecutors in Australia possessed a degree of infallibility in relation to disclosure that was not shared by their counterparts in England. There were sufficiently regular official reports of police misconduct and unethical practices during the period in question to demonstrate that the police in Australia did not operate on a morally higher plane than their English counterparts, see the acknowledgment by Gibbs J in *R v Driscoll* (1977) 137 CLR 517 at 539 and the frank discussion of the High Court in *R v Kelly* (2004) 218 CLR 216 at 225 per Gleeson CJ and Hayne and Heydon JJ, at 246-250 per McHugh J ((see in particular the catalogue of official reports in Australia detailing police malpractices cited by McHugh J at (2006) 218 CLR 216 at 249, n 94) and at 262 per Kirby J. Police forces, and perhaps even prosecutors, in both

there have been similar instances in Australia of probative material being withheld in cases where convictions were later quashed.<sup>156</sup> These cases in both England and Australia provide confirmation that the modest formal obligations and the informality of the “Old Boys Act” or “Old Towels Act” approach to disclosure did not ensure a fair trial and protect the interests of the accused.

[5.5.11] Throughout the 1970s there was increasing awareness of the potential for injustice arising from the limited obligations of the “Old Boys Act” approach to disclosure and there were increasing calls in various official and semi-official reports for some form of enhanced and formal prosecution duty of disclosure.<sup>157</sup> These concerns in England eventually found expression in the *Attorney-General’s Guidelines* of 1981.<sup>158</sup>

## **Part 6: Modern Approach to Disclosure in England: The Floodgates Unlocked or an Overdue “Policy of Glasnost”?**

The prosecution obligation to make disclosure to the defence in criminal trials has developed with astonishing speed over the last 20 years.<sup>159</sup>

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countries would not have been immune to the effects of “tunnel vision” and the temptation not to reveal material in a criminal investigation that did not accord with the prosecution’s theory of the guilt of the accused. I would suggest that it may be the absence of a body in Australia such as the Criminal Cases Review Commission that accounts for the comparative absence in Australia of similar historical miscarriage of justice cases due to non-disclosure as has come to light in England.

<sup>156</sup> See *R v Button* (2002) 25 WAR 382 (accused spent five years in prison for manslaughter) and *R v Beamish* [2005] WASCA 62 (a deaf mute who was convicted of a murder on the basis of disputed confessions and was sentenced to death and spent 15 years in prison after the death sentence was commuted to life imprisonment). In both cases the real culprit was a notorious serial killer called Eric Cooke who admitted his guilt minutes prior to being hanged in 1964. See further Blackburn, E, *Broken Lives-The Complete Life and Crimes of Serial Killer Eric Edgar Cooke* (South Yarra, Hardie Grant, 2002) and Laurie and Taylor, above n 123. It has been argued that *Van Beelen* (the accused had been convicted of the murder of a young child) also represents a similar miscarriage of justice in that probative exculpatory material had not been provided to the defence at trial, see Hawkins, G, *Beyond Reasonable Doubt* (Sydney, Australian Broadcasting Commission, 1977) p 92-100.

<sup>157</sup> See such English references as the Royal Commission on Criminal Procedure, Ch 2, n 262, at [8.13]-[8.14], the “Confait Report” (Fisher, H, *Report of an Inquiry into the Circumstances leading to the Trial of Three Persons on Charges Arising out of the Death of Maxwell Confait and The Fire at 27 Doggett Road, London, SE6* (London, HMSO, 1977), p 243) and James, A, *The distribution of criminal business between the Crown Court and Magistrates’ Courts* (London, HMSO, 1976) p 96. For similar expressions in Australia see below n 271.

<sup>158</sup> [1982] 1 All ER 734. These were a set of guidelines from the Attorney-General to prosecutors in England that encouraged and advised a candid approach to disclosure to any unused material that had “some bearing on the offence(s) charged and the surrounding circumstances of the case.” The Guidelines, though well-intentioned, were far from ideal. Prosecutors appear to have paid uneven adherence to them in practice and their precise status was unclear. It was even held that the law remained as stated in *R v Bryant & Dickson* in *R v Greater Manchester Police, ex parte Fairclough*, unreported, Divisional Court, 1 February 1984, No CO /402/83, Transcript. The Guidelines at [6] still preserved important exceptions to full and frank disclosure and encouraged “a dangerous subjective and vague approach by prosecutors” (O’Connor, above n 103, 471). See further *Ibid*, 468-474 and *R v Lawson* (1990) 90 Cr App R 107, *R v Phillipson* (1990) 91 Cr App R 226 and *R v Sansom* (1991) 92 Cr App R 115.

<sup>159</sup> Butterfield, A Justice, *Review of Criminal Investigations and Prosecutions conducted by HM Customs and Excise* (London, HM Treasury, 2003), p 249.



[5.6.1] This was the opinion of Justice Butterfield in 2003. It is striking that the disclosure landscape in England has undergone astonishing transformation over a comparatively short period of time.

[5.6.2] There were a series of highly publicised miscarriage of justice cases in England that emerged during the late 1980's and early 1990's such as Kiszko,<sup>160</sup> the "Maguire Seven,"<sup>161</sup> the Taylor sisters,<sup>162</sup> the "Birmingham Six,"<sup>163</sup> the "Guildford Four" <sup>164</sup> and Judith Ward.<sup>165</sup> Though there were various factors behind this singularly unedifying chapter in English legal history,<sup>166</sup> a major part in the catalogue of successful appeals was the repeated non-disclosure of significant material by the prosecution to the defence.<sup>167</sup>

[5.6.3] Accordingly, it was not altogether surprising in this climate that a number of English decisions progressively and rapidly expanded the obligation on the part of the prosecution to disclose both used and unused material. This trend began in the influential first instance decision of Henry J in *R v Saunders*,<sup>168</sup> continued with *Maguire* and reached its pinnacle in *R v Ward* where the Court of Appeal declared, "Our law does not tolerate a conviction to be secured by ambush."<sup>169</sup> The court effectively suggested that any material gathered by the prosecution was capable of disclosure.<sup>170</sup> As Hinton has noted these cases had a dramatic effect:

The combined decisions in *Saunders* and *Ward* changed the nature and ambit of the prosecutor's duty to make disclosure to the defence entirely. Everything with the exception of information to which public interest immunity attached was to be made accessible to the defence.<sup>171</sup>

[5.6.4] This comprehensive duty of disclosure was "seen by some as close to opening the police file to the defence."<sup>172</sup> It extended both to used and unused material. Effectively, everything in the prosecution file, was "fair game" to the defence. The *Attorney-General's*

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<sup>160</sup> See Horsnell, above 124, p 5.

<sup>161</sup> *R v Maguire* [1992] 1 QB 936.

<sup>162</sup> *R v Taylor & Taylor* (1994) 84 Cr App R 361.

<sup>163</sup> *R v McKenny* (1991) 93 Cr App R 287.

<sup>164</sup> *R v Richardson & Ors*, *The Times*, 20 October 1989.

<sup>165</sup> *R v Ward* [1993] 1 WLR 619.

<sup>166</sup> It is not for nothing that Connor categorises this period as probably the "darkest hours of British criminal justice," see O'Connor, above n 103, 466.

<sup>167</sup> See Niblett, above n 43, 19-24, Epp, above n 119, 40-42 and O'Connor, above n 103, 465-469.

<sup>168</sup> *R v Saunders & Ors*, unreported, 29 August 1989, Central Criminal Court, No T881630, Henry J. This decision is, surprisingly given its considerable impact on disclosure, unreported. It is discussed at length in Corker, above n 43, 28-30 and O'Connor, above n 103, 469.

<sup>169</sup> [1993] 1 WLR 619 at 674. The final comment of the Court of Appeal stands in stark contrast to the traditional premise at common law to disclosure stated so categorically in cases such as *Holland* and *Thurtel*.

<sup>170</sup> See *R v Ward* [1993] 1 WLR 619 at 645.

<sup>171</sup> Hinton, M, "Unused Material and the Prosecutor's Duty of Disclosure" (2001) 25 Crim LJ 121 at 132.

<sup>172</sup> Auld, Ch 2, n 333, Ch 10 at [124].

*Guidelines*, generous as they had been in 1981, were now outdated and were effectively relegated to history.<sup>173</sup>

[5.6.5] Following *Saunders* and *Ward* it was clear that the prosecutor could no longer cling to any partisan or adversarial position in dealing with issues of disclosure. The prosecutor would have to act with the utmost candour and objectivity as one would expect from a minister of justice and there was no place in the criminal process for tactical games in this context. This theme was strongly confirmed by the decision of the Court of Appeal in *R v Livingstone*<sup>174</sup> in 1993. The accused had been charged with theft in relation to retaining monies he had received as an agent of a building society. The accused’s version was that it was not incumbent upon him to pay any monies straight into the account of the building society and that there was a “practice” where he was permitted to retain the monies, initially at least. This assertion was hotly disputed by the main prosecution witness, a Mr. Brooks from the building society, who asserted that there was a “hard and fast rule” that all monies had to be paid promptly by any agent to the building society. Mr. Brooks insisted that the manual issued by the building society to its agents bore his claim out. It transpired that the manual, far from supporting Mr. Brooks claim, actually supported the assertion of the accused.<sup>175</sup> This manual was provided to prosecution counsel, a Mr. Spencer, during the trial. Though Mr. Spencer read the manual, he did not provide it or make its contents known to defence counsel.

[5.6.6] Rather Mr. Spencer left the manual on counsels’ bench until, during the trial judge’s summing up, the pupil of defence counsel happened to pick up the manual and to read it. The pupil discovered the crucial discrepancy with Mr. Brooks’ evidence and informed defence counsel, who promptly (and quite reasonably) asked for a copy of the manual. Mr. Spencer refused and resisted disclosure on the basis that it was not unused material,<sup>176</sup> and that as the manual had been lying on counsels’ bench in full view of the defence during the trial they could have asked for it at any time. Defence counsel explained that as the prosecutor had not made any reference to the manual, he had taken what the Court of Appeal later described as the, “perfectly reasonable view that there was nothing in it for either side...and that the document was silent on this crucial issue.”<sup>177</sup> The trial judge refused to order disclosure of the manual. The accused was convicted and unsurprisingly appealed.

[5.6.7] At the Court of Appeal Mr. Spencer relied on the *Attorney General’s Guidelines* and valiantly contended that it was not the duty of the prosecution, having got hold of a relevant document, to place it in the hands of the defence if they were aware of its existence and could have asked for it if they had wished. Rougier J, delivering the

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<sup>173</sup> It was explained that these guidelines, well motivated as they had been in 1981, were mere guidance to prosecutors and did not, and could not, have the status of law, see *R v Winston Brown* [1994] 1 WLR 1599 at 1604-1606.

<sup>174</sup> [1993] Crim LR 597 (otherwise unreported). Court of Appeal, 8 March 1993, Transcript: Martin Walsh Cherer.

<sup>175</sup> The Court of Appeal emphasised that they did not wish to impugn the honesty of Mr. Brooks. Rather he must have made a “genuine mistake” (Transcript, 2).

<sup>176</sup> Just how Mr. Spencer arrived at this position is unclear. It is in plain that the manual was both unused material and relevant. At the Court of Appeal Mr. Spencer belatedly accepted that the manual was relevant unused material

<sup>177</sup> Transcript, 2.

judgment of the Court of Appeal, was unimpressed. He emphasised that the question of disclosure in criminal cases was not an adversarial and partisan game. Rather it was "a serious matter conducted in a court of law and, one piously hopes, in a court of justice as well."<sup>178</sup> His Lordship acidly observed of Mr. Spencer's submission:

In the judgment of this court, which cannot be too strongly emphasised, that view is erroneous. It is the duty of the prosecution in all cases where material, whether documentary or otherwise, which is of relevance to the defence comes into their hands to make the defence a present of such material. The *Attorney General's Guidelines* are not exhaustive, as has been shown in the recent case of *Ward* reported in the latest volume of the Criminal appeal reports, and if that still remains Mr. Spencer's view of the duty of the prosecution we would respectfully suggest that he gives himself a refresher course by looking at chapter 4 of *Archbold* paragraphs 273 and 294.<sup>179</sup>

[5.6.8] Undeterred by this withering judicial rebuke Mr. Spencer sought to uphold the conviction by the well known application of the "proviso."<sup>180</sup> Rougier J merely noted that "as an act of benevolence" he would not repeat Mr. Spencer's arguments and "in the face of such grave irregularities on a highly material issue" the conviction had to be quashed.<sup>181</sup>

[5.6.9] Though one really cannot quibble with the fate accorded to the unfortunate Mr. Spencer in *Livingstone*, it is notable that the *Saunders* and *Ward* disclosure obligations proved unpopular to prosecution lawyers and police officers. They were widely felt to be too onerous and imprecise. The sheer magnitude and potential impracticability of the obligations cast upon by the prosecution by the *Saunders* and *Ward* line of authority was highlighted by the decision of the Court of Appeal in *R v Browning*<sup>182</sup> in 1995. The accused had been convicted of the murder of a female motorist on the basis of various and detailed items of circumstantial evidence. The case had been highly publicised and the police had received some 2987 separate messages during the course of their investigation. The Court of Appeal criticised the prosecution for not having revealed to the defence various information<sup>183</sup> that included two messages from a person who had not even been called as a prosecution witness at trial on the basis that the descriptions in these messages had not fitted Browning. In her commentary on the decision Birch noted the difficulty of the prosecution in such a voluminous case of attaining such an exacting standard of disclosure. "Ensuring that nothing has been omitted from the duty to disclose which might benefit the defence in any of the ways described by the court looks to be a Herculean labour, possibly of the Poirot variety."<sup>184</sup>

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<sup>178</sup> [1993] Crim LR 597 at 598. See further above n 2.

<sup>179</sup> Transcript, 2-3.

<sup>180</sup> That is by asserting no substantial miscarriage of justice had been occasioned by the error as to disclosing the manual.

<sup>181</sup> Transcript, 3.

<sup>182</sup> [1995] Crim LR 227.

<sup>183</sup> This included the revelation one prosecution witness had undergone hypnosis and a material statement from a prosecution witness.

<sup>184</sup> Birch, D, "Commentary [to *R v Browning*]" [1995] Crim LR 229. See further Part 6 of Chapter 6 at [6.6.2].

[5.6.10] Furthermore, there was a perception after *Ward* in prosecution quarters that some defence lawyers were “playing the system” and were misusing unused material in order to “manufacture” defences while at the same time submitting speculative and excessive demands in the nature of a “fishing trip” into areas of peripheral significance that weren’t really in dispute.<sup>185</sup> These misgivings about the operation of the new post *Ward* disclosure regime were echoed by Lord Templeman in 1994 in *R v Chief Constable of West Midlands, ex parte Wiley*.<sup>186</sup> His Lordship noted that while in civil proceedings the relevance of a document depended on the written pleadings of the parties, in a criminal context the position was quite different:

In criminal proceedings there is as yet no provision for written pleadings. Prosecution authorities know which documents are relevant but they cannot know for certain what documents will be relevant to the defence. In recent cases the Court of Appeal has quashed convictions because of the failure on the part of the police to disclose documents which, subsequently to the convictions,<sup>187</sup> were held to be relevant and material to the establishment of the guilt or innocence of the accused. In order to avoid criticism and a miscarriage of justice one way or the other, the police authorities now feel obliged to disclose documents of doubtful relevance and materiality...The result in criminal proceedings is that masses of documents of no or doubtful relevance or materiality are made available to judge and jury. The indiscriminate and undisciplined preparation and presentation of documents for trial increase the length and cost of trial and sometimes enable a litigant to snatch an undeserved victory under a cloak of confusion and obscurity which baffles judge and jury.<sup>188</sup>

[5.6.11] Against this unsatisfactory background the Royal Commission on Criminal Justice in 1993 agreed that the obligations imposed by the *Saunders* and *Ward* line of authority had gone too far:

... the decisions have created burdens for the prosecution that go beyond what is reasonable. At present the prosecution can be required to disclose the existence of matters whose potential relevance is speculative in the extreme. Moreover, the sheer bulk of the material involved in many cases makes it wholly impracticable for every one of what may be hundreds of thousands of individual documents to be disclosed.<sup>189</sup>

[5.6.12] In *R v Keane*<sup>190</sup> the Court of Appeal sought to introduce some semblance of order and structure into the apparent chaos. The court offered comprehensive guidance to prosecutors as to what unused material was required to be disclosed. The court

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<sup>185</sup> See Auld, Ch, 2, n 333, Ch 10 at [124]. See further the discussion in Part 10 of Chapter 6.

<sup>186</sup> [1994] 3 All ER 420.

<sup>187</sup> Lord Templeman was referring evidently to cases such as *Ward*, *Maguire* and *Kiszko*, see further above n 124.

<sup>188</sup> [1994] 3 All ER at 420 at 423-24. This defence technique was well illustrated according to Lord Templeman by *R v Preston* [1993] 4 All ER 638 and *R v Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281. The issue of disclosure had been employed in *Osman* as an effort merely to delay extradition and embarrass the authorities and persuade them to change their mind about deporting the defendant. In *Preston* the accused had waited till the very trial to reveal in detail his defence and lodge an “unfounded claim” for disclosure of certain intercepted telephone calls that bore “all the hallmarks of a tailored defence to exploit the impossibility of producing the intercepts” [1994] 3 All ER 420 at 424. See further the discussion in Part 10 of Chapter 6.

<sup>189</sup> Royal Commission on Criminal Justice, *Report* (London, HMSO, 1993) Ch 6 at [48].

<sup>190</sup> [1994] 2 All ER 478.

considered that material should be divulged to the defence, issues of public interest immunity aside, if on a "sensible" appraisal by the prosecution it:

1. Was relevant or possibly relevant to an issue in the case.
2. Raised or possibly raised a new issue whose existence was not apparent in the evidence the prosecution proposed to use.
3. Held out a real (as opposed to a fanciful) prospect of providing a lead on evidence which went to either 1 or 2 above.<sup>191</sup>

[5.6.13] This test has proved highly influential in both England and Australia. It was subsequently approved by the Court of Appeal in England in *R v Winston Brown*<sup>192</sup> which attempted to provide further clarification by holding that the phrase "an issue in the case" was to be accorded a broad construction by the prosecutor.<sup>193</sup> The test in *Keane* and the refinement of it by the Court of Appeal in *Winston Brown* were subsequently approved when the case went on further appeal to the House of Lords.<sup>194</sup> Even the hitherto overlooked summary courts were not immune from the newfound judicial insistence on frank disclosure. In *R v Kingston-upon-Hull Justices, ex parte McCann*<sup>195</sup> Bingham LJ observed that Crown prosecutors are "generally well advised to follow a policy of glasnost" and disclose to the defence the material upon which they intend to rely.<sup>196</sup> This candour was held to extend to the disclosure of both the evidence to be adduced at trial<sup>197</sup> or of any relevant unused material in the prosecution's possession.<sup>198</sup>

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<sup>191</sup> [1994] 2 All ER 478 at 484. The Court of Appeal adopted this test from an unreported first instance decision of Jowitt J, see *R v Melvin & Dingle*, Central Criminal Court, 20 December 1993.

<sup>192</sup> [1994] 1 WLR 1599.

<sup>193</sup> [1994] 1 WLR 1599 at 1606-1607.

<sup>194</sup> *R v Winston Brown* [1998] AC 367 at 377.

<sup>195</sup> (1991) 155 JP 569.

<sup>196</sup> (1991) 155 JP 569 at 573-574.

<sup>197</sup> See *R v Stratford Justices, ex parte Imbert* [1999] EWHC Admin 118 where the Divisional Court whilst disagreeing with the assertion that the accused in a summary case had an absolute entitlement to the details of the prosecution evidence, emphasised that such disclosure was desirable and ought to be furnished in all but the most exceptional case. This is now confirmed by official guidance, see the *Attorney-General's Guidelines: Disclosure of Information in Criminal Proceedings* (2005) at [7].

<sup>198</sup> See *R v Bromley Magistrates' Court, ex parte Smith* [1995] 4 All ER 146. The prosecution's duty, if any, with respect to the disclosure of unused material in the summary courts was initially overlooked, see Darbyshire, Ch 1, n 27, 635. However, the extension in *Bromley Magistrates* of the prosecution's duty to the summary courts accords with both common sense and principle. Given the importance of the summary courts in the administration of criminal justice (see Chapter 1, n 27, and the discussion in Part 2 of Chapter 1 at [1.2.2]), it would be unsatisfactory if there were some lesser or different procedure governing summary trials as opposed to trial on indictment at the higher courts (see *R v Stipendiary Magistrate of Norfolk, ex parte Taylor* [1998] Crim LR 276 and Darbyshire, Ch 1, n 27, 635, n 47). As Smith notes, "An accused is as much entitled to the safeguards designed to ensure a fair trial in the Magistrates' Court as in the Crown Court" (see Smith, J, "Commentary [to *R v Bromley Magistrates' Court*]" [1995] Crim LR 249). Whilst the argument in Australia in favour of extending the prosecution's modern duty of disclosure to summary cases appears similarly logical, there does not appear to have been any Australian case that has formally extended the prosecution's duty of disclosure of unused material to summary cases (though see [4.3] of the *Disclosure Policy* of the Commonwealth DPP which contemplates that the duty of disclosure applies in summary cases). The extent to which disclosure is carried out in practice by police prosecutors in Australia is unclear, see in this context St John, Ch 1, n 89, 497 and Krone, Ch 1, n 123, 11-12 and

[5.6.14] It will be seen that whilst *Keane* and *Winston Brown* did provide some welcome guidance to prosecutors in England, the disclosure obligations imposed on the prosecution remained very extensive and far-reaching. Concerns continued to be expressed as to the law on disclosure being unduly burdensome on the prosecution and unnecessarily generous to the defence.<sup>199</sup> It will be noted that *Keane* had firmly placed the onus on the prosecution to identify what was “relevant” and to be disclosed and what was not relevant and accordingly not to be disclosed. This caused, as noted by Lord Templeman in *Wiley*, additional problems. It was still felt that the system was unworkable and open to manipulation by the defence. The then Home Office Minister in 1995 commented:

The current law requires the prosecutor to disclose to the accused anything which might possibly be relevant to an issue at the trial, whether or not it has any bearing on the defence which the accused relies on at trial. It is open to the accused, if he so wishes, to seek the disclosure of large volumes of material in an attempt at least to delay the onset of the trial, and if possible to uncover some sensitive material which the prosecutor cannot disclose and thereby cause the abandonment of the proceedings. That is what has happened in practice. In short the current disclosure regime is neither fair, nor efficient, nor effective.<sup>200</sup>

[5.6.15] It was not surprising that the then Conservative Government felt that a whole “fresh start” was required. Accordingly, the *Criminal Procedure and Investigations Act 1996* (“the CPIA”) was enacted to establish a new comprehensive statutory regime. The CPIA was specifically intended to replace the existing common law.<sup>201</sup> However, it is debatable to what extent the CPIA did succeed in its stated aim.<sup>202</sup> As has been suggested by Leng and Taylor, while obviously Parliament could replace or substitute the existing common law it was less easy to displace the underlying common law concepts.<sup>203</sup> Any lacunae in the statute will be filled by common law principles very similar to those that were ostensibly abolished. In particular, as the editor of the 2002 edition of *Archbold* noted, the prosecutor remains subject to his or her previous professional duties as a minister of justice, namely, “The requirement for a prosecutor to ask himself what fairness and justice demand and then act accordingly, is one of general application and arises from his general responsibility to act in the character of a minister of justice

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the discussion in Part 2 of Chapter 1 at [1.2.13] as to the “hidden” nature of their work. It is beyond the scope of this Thesis to pursue this issue.

<sup>199</sup> See, for example, the view of Barbara Mills, the then DPP in England, quoted by Niblett, above n 43, 30.

<sup>200</sup> Quoted by Butterfield, above n 159, 250.

<sup>201</sup> See s 21(1) of the CPIA that purports to extinguish the existing rules at common law governing disclosure. For an overview of the operation of the CPIA see Leng, R, and Taylor, R, *Blackstone’s Guide to the Criminal Procedures and Investigations Act 1996* (London, Blackstones, 1996).

<sup>202</sup> Like the hardy vampire typically played by Sir Christopher Lee in a low budget horror film it has proved extraordinarily difficult to extinguish the common law.

<sup>203</sup> Leng and Taylor, above n 201, 12. See further Sprack, J, “The *Criminal Procedure and Investigations Act*: The Duty of Disclosure” [1997] Crim LR 308 at 318.

assisting in the administration of justice."<sup>204</sup> This basic proposition was, of course, left unchanged by the CPIA.<sup>205</sup>

[5.6.16] However, putting aside any potential lingering specific common law duties, in the main, the issue of disclosure and unused material in England is now governed by the CPIA.<sup>206</sup> Application of that Act involves a three stage process. In the first stage, by way of "primary disclosure," the prosecution has to furnish to the defence any material in its possession that it considered<sup>207</sup> "undermined" the prosecution case along with an accompanying schedule that listed all the non-sensitive unused material in its possession. The next stage then requires the defence to submit a "defence statement" that was to set out the proposed defence of the accused and to identify what portion of the prosecution case that he or she took issue with. This document was supposed to assist the prosecutor in complying with the third stage of "secondary disclosure." This required the prosecution to have regard to the contents of the defence statement and to disclose any item that might reasonably be expected to assist the defence case in light of the contents of the defence statement. The defence under the CPIA are not entitled, in theory at least, to pursue "fishing expeditions" and are not entitled to material that neither undermines the prosecution case nor assists their case. Under a Code of Practice issued pursuant to the CPIA and additional comprehensive guidelines issued by the Attorney General<sup>208</sup> both the police and the prosecuting lawyers are subject to various requirements and obligations. Notably, the police are now expected to conduct a proper and objective investigation and must take all "reasonable lines of enquiry" in pursuing an investigation and must look at material that is both favourable and unfavourable to the prosecution position.<sup>209</sup> Prosecutors are exhorted to not accord a narrow definition at either the primary or secondary disclosure stages. There is a further obligation on the prosecution to make active enquiries of its own in relation to any material held by a third party that could be of relevance in the case.<sup>210</sup> This remains broadly defined.

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<sup>204</sup> Richardson, J (ed), *Archbold Criminal Pleading, Evidence and Practice* (2002 edition) (London, Sweet & Maxwell, 2002) p 1253 at [12.49].

<sup>205</sup> A practical application of this proposition is found in *R v DPP, ex parte Lee* [1999] 2 All ER 737. See also *R v DPP, ex parte Beaney & King* [1999] EWHC Admin 432.

<sup>206</sup> The CPIA has been recently amended but the basic procedure remains, albeit with different terminology.

<sup>207</sup> This subjective test was widely criticised as even an unreasonable prosecutorial view as to what did not undermine its case was permissible, see Young and Sanders, Ch 1, n 27, 344.

<sup>208</sup> *Attorney General's Guidelines: Disclosure of Information in Criminal Proceedings* (note the 2000 and 2005 versions).

<sup>209</sup> See [3.4] of the CPIA *Code of Practice*. The dramatic and potentially far reaching scope of this provision is highlighted by Corker and Young, see Corker, D, and Young, D, *Abuse of Process in Criminal Proceedings* (London, Butterworths, 2003) p 96. In light of some of the historical miscarriage of justice cases and the "tunnel vision" displayed therein one might have expected this requirement to pursue all reasonable lines of enquiry whether pointing to or away from the guilt of the suspect to be something of a novel concept in certain police circles.

<sup>210</sup> See *Attorney General's Guidelines: Disclosure of Information in Criminal Proceedings* (2005) at [51]. This last proposition can present difficulties in the context of defence efforts to seek material for use in cross-examination, especially as to a victim's credibility, and raises issues of the proper regard to be had to the interests of victims and witnesses. See further the discussion in Part 11 of Chapter 6.

[5.6.17] Though the CPIA passed with broad political support in Parliament<sup>211</sup> it was, and has continued to be, vehemently attacked in certain quarters.<sup>212</sup> One vocal criticism was that such an Act undermined the prosecution’s requirement to prove a case beyond reasonable doubt and was contrary to the privilege of an accused person against self-incrimination.<sup>213</sup> It was contended that it was wrong and unfair to entrust the flow of information in a criminal trial to the prosecution.<sup>214</sup> It was further pointed out that the initial problems had arisen in connection with prosecution non-disclosure in the notorious miscarriage of justice cases and the need for an accused person to be aware of the case against him and any relevant material should be strengthened, rather than diminished.<sup>215</sup> It was argued that after the recent experiences of non-disclosure it was unrealistic and undesirable to expect the police and prosecutors to objectively and impartially consider what might or might not be relevant to an accused.<sup>216</sup> As Leng observes in light of the experience of non-disclosure, “there is no historical justification for investing police and prosecutors with this degree of trust, if it can be avoided.”<sup>217</sup> As one barrister categorised it, putting the police or the prosecutors in charge of disclosure was tantamount to the “fox [being] in charge of the henhouse.”<sup>218</sup>

[5.6.18] Whatever one’s opinion as to the merits of the CPIA or otherwise it is fair to say that the regime it established has virtually satisfied virtually nobody in practice and it has been widely regarded as unworkable.<sup>219</sup> As Corker and Parkinson comment, there has been “widespread and endemic lack of confidence” by all parties in the CPIA.<sup>220</sup> Though the flaws, both theoretical and practical, of the English system of disclosure will be considered in more detail in the next Chapter, none of the parties in the criminal process has escaped criticism in the operation of the CPIA. The police have been accused of submitting incomplete and misleading schedules of unused material and of omitting and

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<sup>211</sup> It was, perhaps not coincidental, that a general election was imminent and that both main political parties in England were striving to appear to be “tough” on criminal issues.

<sup>212</sup> See, for example, Sharp, S, “Disclosure, Immunity and Fair Trials” (1999) 63 Jour Crim Law 67.

<sup>213</sup> See the Note of Dissent offered by Michael Zander in the Report of the Royal Commission on Criminal Justice that considered the issue, see RCCJ, above n 189, 221 at [1]-[2]. See also Auld, Ch 2, n 333, Ch 10 at [144]-[156].

<sup>214</sup> Corker, above n 43, x. See also Bennathan, J, “Made for Miscarriages,” *The Times*, 25 July 2000.

<sup>215</sup> See Ede, R, and Shepherd, E, *Active Defence* (2<sup>nd</sup> ed) (London, Law Society Publishing, 2000) p 1-11 and Fisher, S, “The Prosecutor’s Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England” (2000) 68 Fordham L Rev 1379 at 1397.

<sup>216</sup> See Emmerson, B, “Prosecution in the Dock,” *The Observer*, 14 November 1999, Sharpe, above n 212, 79-80 and Fisher, above n 215, 1396-1397. See further the discussion in Parts 4 and 5 of Chapter 6.

<sup>217</sup> Leng, R, quoted in Auld, Ch 2, n 333, Ch 10 at [173].

<sup>218</sup> Unnamed “senior barrister” quoted in Emmerson, above n 216. This uncharitable (to the prosecution at least) view was not without substance as later cases and studies would demonstrate, see the discussion in Part 4 of Chapter 6.

<sup>219</sup> For a concise summary of the many criticisms of the CPIA’s operation, see Auld, Ch 2, n 333, Ch 10 at [167] and the similar view expressed by the then Attorney-General, Lord Goldsmith QC, see Goldsmith, P, “Attorney-General’s Speech to Whitehall Prosecutors Conference 2005,” London, 4 October 2005, available at: [http://www.attorneygeneral.gov.uk/attachments/04\\_10\\_05\\_speech\\_WPC\\_delivered.doc](http://www.attorneygeneral.gov.uk/attachments/04_10_05_speech_WPC_delivered.doc).

<sup>220</sup> Corker and Parkinson, above n 122, 20 at [1.61]. See also Plotnikoff, J, and Woolfson, R, *A Fair Balance? Evaluation of the operation of the Disclosure Law (RSD Occasional Paper No 76)* (London, Home Office, 2001) p 141.



not revealing important information.<sup>221</sup> The prosecution lawyers have been accused of failing to insist on adherence to the CPIA and of not checking the unused material or failing to consider properly what should be divulged by way of primary and secondary disclosure.<sup>222</sup> It has been said that the prosecution has still not embraced the spirit of candour and transparency in respect of disclosure that one would expect of a minister of justice.<sup>223</sup> The defence lawyers have been accused of routinely submitting defence statements so bland (if they are even provided) as to be virtually worthless<sup>224</sup> and of continuing to submit lengthy "shopping lists" and speculative "fishing trips" as to unused material into areas of no real significance in the often wishful hope that "something" might turn up.<sup>225</sup> The courts have been accused of ignoring the clear requirements of the CPIA and of failing to ensure that the prosecution and defence abide by both the substance and spirit of the Act.<sup>226</sup> The English CPIA has not served as an ideal role model for a system of disclosure. As Kuo and Taylor comment, "the CPIA's provisions are commonly misapplied and misunderstood and confidence in the disclosure regime remains fragile."<sup>227</sup>

[5.6.19] The CPIA was designed to simplify the procedures governing unused material and to limit the *Ward* and *Keane* requirements as to just what the prosecution has to divulge. In both respects the CPIA has arguably failed to fulfil its legislative intent. As one prosecution lawyer commented to Butterfield J, "We are spending many times longer over disclosure than we ever did before CPIA: but we are disclosing just as much as we ever did."<sup>228</sup>

[5.6.20] A modern police investigation into a wide category of offences such as fraud, organised crime, drug dealing, murder, terrorism, sexual crimes and tax evasion can acquire interstate and even international dimensions and the sheer mass of material that can be assembled in the course of such an investigation is immense.<sup>229</sup> The unused material in a complex case can occupy a whole room and even a warehouse.<sup>230</sup> When the prosecuting authorities must also have regard to material in the possession of a third

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<sup>221</sup> Taylor and Kuo, above n 10, 719, especially n 147 and 725-727, Fisher, above n 215, 1410-1411 and HM Crown Prosecution Service Inspectorate, *Report of the Thematic Review of the Disclosure of Unused Material* (London, HMCPS Inspectorate, 2000) [3.38]-[3.39].

<sup>222</sup> See Editorial, "Prosecutors are Failing in their Statutory Disclosure Duties" (2008) 158 NLJ 683 and Auld, Ch 2, n 333, Ch 10 at [129].

<sup>223</sup> See, for example, Ede and Shepherd (2000), above n 215, 8.

<sup>224</sup> See, for example, Auld, Ch 2, n 333, Ch 10 at [158]; Goldsmith, above n 219, 16 and *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court* at [34]. See also the discussion in Part 8 of Chapter 6.

<sup>225</sup> See Goldsmith, above n 219, 5. See further the discussion in Part 10 of Chapter 6.

<sup>226</sup> See, Fisher, above n 215, 1397, n 99.

<sup>227</sup> Kuo and Taylor, above n 10, 722. See also Plontikoff and Woolfson, above n 220, xix-xx.

<sup>228</sup> Butterfield, above n 159, 258. See also Plontikoff and Woolfson, above n 220, 109-115.

<sup>229</sup> See further the discussion in Part 6 of Chapter 6. Such complex investigations are far from unusual in the modern age and computer technology, far from solving the problems, appears to exacerbate them, see Goldsmith, above n 219, 8.

<sup>230</sup> Butterfield, above n 159, 256. See further the discussion in Part 6 of Chapter 6.

party it can be readily seen that the challenge facing the prosecutor in relation to disclosure is enormous.

[5.6.21] The prosecutor is placed in a difficult professional position in judging what may assist an accused. A subject as complex as disclosure and unused material can give rise to difficult questions of judgment and highlights the ongoing tension between the prosecutor’s roles as both minister of justice and active advocate in an adversarial criminal system. The tension inherent in being both adversary and minister of justice renders it imprudent to leave the prosecutor, as Hinton has argued, with the crucial power to decide what unused material should or should not be disclosed where that decision requires an assessment of the qualitative nature of the material to the defence.<sup>231</sup> It is clear that the development of the prosecutor’s duty of disclosure has exacerbated the longstanding and inherent tension in the dual prosecutorial roles of both minister of justice and adversarial advocate.<sup>232</sup> Lord Mustill in 1993 in *R v Preston*<sup>233</sup> noted that the prosecuting lawyer is “required to hold the ring” between the interests of the state as prosecutor and the defendant.<sup>234</sup> He explained:

Recent developments on the law and practice regarding disclosure by the prosecution of ‘unused materials’ have also created tensions within the criminal process. Traditionally this process has been adversarial, with the prosecutor on one side, the defendant on the other, and the judge and jury in the middle. The heavy responsibilities now placed on prosecuting counsel have blurred the edges, not only because he is required to perform tasks which may benefit his opponent (although of course they are designed to benefit the administration of justice) but because when he decides what ought to be disclosed his acts are administrative and also in a sense judicial in character.<sup>235</sup>

[5.6.22] There also remain major problems with prosecuting agencies still failing to disclose pertinent information and studies found an alarming rate of cogent material still being withheld, whether wittingly or unwittingly, by police and prosecutors.<sup>236</sup> There are regular assertions that significant material remains withheld as a matter of routine to this day and that the prosecution is still simply either unable or unwilling to deal with questions of disclosure in the necessary objective and impartial manner.<sup>237</sup> Even more disturbingly there have continued to be a series of post CPIA cases that have featured continued non-disclosure of relevant material by the prosecution and successful appeals against conviction.<sup>238</sup> This theme has been especially present in a linked series of prosecutions in England brought by HM Customs involving the alleged large scale

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<sup>231</sup> Hinton, above n 171, 134. See further the discussion in Parts 3 and 5 of Chapter 6.

<sup>232</sup> See the discussions in Part 9 of Chapter 2 and Chapter 4.

<sup>233</sup> [1993] 4 All ER 638.

<sup>234</sup> [1993] 4 All ER 638 at 648.

<sup>235</sup> [1993] 4 All ER 638 at 648.

<sup>236</sup> See the discussion in Ede and Shepherd, above n 215, 8-10 and Taylor and Kuo, above n 10, 719-722.

<sup>237</sup> See, for example, Taylor, C, “Advance Disclosure and the Culture of the Investigator: the Good Idea that never quite caught on?” (2005) 33 Int Jour Sociology of the Law 118. See further Taylor, C, *Criminal Investigation and Pre-Trial Disclosure in the United Kingdom* (New York, Edwin Meller Press, 2006). See further Parts 4 and 5 of Chapter 6.

<sup>238</sup> See, for example, *R v Brady* [2004] EWCA Crim 2230 and *R v Higgins* [2002] EWCA Crim 336. See further the discussion in Part 4 of Chapter 6.

smuggling of contraband alcohol and tax evasion where crucial issues of disclosure, notably in relation to public interest immunity, had been incompetently, and even dishonestly, handled by the prosecuting authorities.<sup>239</sup> The vexed issue of the prosecutor's role in claims of public interest immunity has proved especially problematic and remains far from resolved.<sup>240</sup> These continuing problems illustrate that over a decade after the most celebrated miscarriage of justice cases, disclosure and unused material remain a contentious and unresolved part of the criminal process in England.

[5.6.23] As a result the CPIA was recently amended to tighten the requirements on all parties within the criminal trial.<sup>241</sup> Parliament was unwilling to jettison the statutory scheme and clearly contemplated that with certain reforms, it should continue. It will remain to be seen whether these reforms will alleviate the powerful problems of both principle and practice regarding disclosure that have arisen in England since the early 1990s.<sup>242</sup> It has proved easier said than done to devise a solution governing prosecution disclosure that is "fair, efficient and effective." What is clear, I would suggest, from the English experience, is that considerable caution should be employed before importing the English model to Australia.

## **Part 7: Modern Developments to Disclosure in Australia: "Catch up" to England?**

[5.7.1] The issues of disclosure and unused material have until very recently acquired far less prominence in Australia than that accorded to them in England. Hinton in 2001 drew attention to the fact that the appellate courts in Australia had not been troubled by the issues to the same extent as their counterparts in England.<sup>243</sup> Why this is the case is not entirely clear. Hinton speculates, probably accurately, that one reason for this may be that unlike the experience in England, "miscarriages of justice due to non-disclosure have not occurred with same degree of frequency nor sensationalism in Australia as to cause an appellate court to act so decisively."<sup>244</sup>

[5.7.2] Whatever the reason for the lack of prominence traditionally accorded to questions of disclosure in Australia, it would appear that many Australian prosecutors, in stark contrast to their English counterparts, would probably not, until very recently at

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<sup>239</sup> See *R v Early & Ors* [2003] 1 Cr App R 19 and *R v Patel & Ors* [2002] Crim LR 304. See also Butterfield, above n 159. The result of this debacle was the eventual quashing of the convictions of 109 defendants, see Taylor, C, "What Next for Public Interest Immunity" (2005) 69 Jour Crim L 75 at 77. See further the discussion in Part 12 of Chapter 6.

<sup>240</sup> See *Ibid*, 75-83 and *R v Jackson* [2000] Crim LR 377 and *R v H* [2004] 2 AC 134 at 148-151. See further the discussion in Part 12 of Chapter 6.

<sup>241</sup> The much criticised subjective primary disclosure stage was replaced with an objective test for "initial disclosure." There are stricter requirements for a detailed defence statement to trigger "continuing disclosure" by the prosecution.

<sup>242</sup> There is a strong view that the new law will not prove any more effective than the previous law, see, for example, Quirk, H, "The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work" (2006) 10 Ev Pro 42. See further the discussion in Part 13 of Chapter 6.

<sup>243</sup> Hinton, above n 171, 123.

<sup>244</sup> *Ibid*.

least, have had to confront or deal with questions of disclosure. However, any hope on the part of Australian prosecutors that they might have been spared the formidable problems of principle and practice that have confronted English prosecutors is now likely to be dispelled. With the recent decision of the High Court in *R v Mallard*,<sup>245</sup> the disclosure “cat” is now well and truly “out of the bag.” Australian prosecutors will have to wrestle with the same difficult issues that have troubled their English colleagues for over a decade and a half.

[5.7.3] It will be recalled that in the 1970s the informal “Old Boys Act” system for disclosure operated and the formal obligations on the prosecution in Australia were comparatively modest.<sup>246</sup> This was confirmed in 1979 by the High Court in the important, if now largely overlooked,<sup>247</sup> decision in *R v Lawless*.<sup>248</sup> The accused had been convicted of murder after two trials. The principal prosecution witness, a Mrs. Joyce, had described a disagreement between Lawless and the deceased that had led to Lawless fatally shooting the deceased. Mrs. Joyce was clear that no one else had been involved or present at the scene. There was fingerprint evidence on a packet of cigarettes linking the accused to the scene of the murder. Two other prosecution witnesses, residents in the vicinity, had indicated that there may have been two men (excluding the deceased) present at the scene of the shooting. The accused at the trial raised an alibi and asserted that he was elsewhere. He claimed at trial that the police had “framed” him. The packet of cigarettes had been “planted” at the scene and Mrs. Joyce had been coerced into incriminating him. It transpired that another person, a Mrs. Telford, had made a statement to the police in which she had clearly described two men present at the shooting. This evidence clearly contradicted that of Mrs. Joyce. This statement was furnished to prosecuting counsel at trial but he decided not to call Mrs. Telford. It would seem that the prosecutor regarded her as an honest witness but simply mistaken in her account of the presence of two men. Indeed, the prosecutor neither informed the defence of her statement nor of its contents or even of her existence.<sup>249</sup> The defence, after the trial became belatedly aware<sup>250</sup> of the existence and contents of Mrs. Telford’s statement and certain other material.<sup>251</sup> This undisclosed material included an initial statement from another prosecution witness, a Mrs. Boland, which the first trial judge had ordered to be produced to the defence. The accused sought to challenge his conviction on the basis of the undisclosed material.

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<sup>245</sup> (2005) 224 CLR 125. It is important to realise that *Mallard* was not a sudden and unexpected development. Rather, as Kirby J makes clear in his judgement, it was the culmination of years of developments in both Australia and overseas and of arguments of public policy.

<sup>246</sup> This emerged from cases such as *Re: Van Beelen* (1974) 9 SASR 163 and *R v Charlton* [1972] VR 758.

<sup>247</sup> At least in terms of its significance to the issue of disclosure.

<sup>248</sup> (1979) 142 CLR 659.

<sup>249</sup> It will be noted that the prosecutor had seemingly failed to meet even the modest obligations suggested by *Bryant & Dickson* and *Van Beelen*.

<sup>250</sup> Through the Beach Enquiry into unrelated allegations of police misconduct, see (1979) 142 CLR 659 at 681 per Murphy J.

<sup>251</sup> This included medical information relating to Mrs. Joyce’s psychiatric condition and a note of an initial conversation between her and a police officer that was exculpatory of the accused and inconsistent with her later evidence at trial.

[5.7.4] This challenge was dismissed by the Full Court of the Supreme Court of Victoria.<sup>252</sup> The court<sup>253</sup> held, reflecting the position adopted in cases such as *Van Beelen* and *Bryant and Dickson*, that there existed no general rule requiring disclosure of such unused material as the statement of Mrs. Telford. Indeed, Lush J went further and stated that the prosecution had not even been required to inform the defence of the existence of Mrs. Telford.<sup>254</sup> The court considered that the undisclosed material was either irrelevant or inadmissible.<sup>255</sup> It would not have affected the outcome of the trial.

[5.7.5] It is, nevertheless, worthy of note that O'Bryan J was less than impressed with the somewhat partisan nature of the conduct of the prosecution at trial. The failure of the prosecution to comply with the order of the first trial judge could not be excused. His Honour was clearly conscious of the need for the prosecutor to act as a minister of justice. He commented:

It has been said by high authority that the prosecution has a duty to conduct the prosecution with fairness towards the accused with a view to determining and establishing the truth...There were a number of matters that occurred in the course of the trial of Lawless that reflect failure on the part of the prosecution to maintain that concept of fairness. ...Notwithstanding that the trial was lengthy and complicated and that Lawless might have been regarded by the prosecutor as obstructive and difficult to deal with at times, the prosecution must uphold the standards prescribed in authorities such as *R v Lucas*...<sup>256</sup>

[5.7.6] On further appeal to the High Court the defence chiefly complained of the prosecutor's failure to have supplied the statement of Mrs. Telford. The majority of the High Court; Barwick CJ, Stephen, Mason and Aickin JJ, reached a similar conclusion as the Full Court of the Supreme Court. Their Honours considered that the statement of Mrs. Telford was not significant or powerful enough to have either prejudiced the defence case at trial or to have led the jury to arrive at a different verdict. As the accused had relied on an alibi defence, Mrs. Telford's statement did not materially advance his defence. The evidence of Mrs. Joyce remained ample to sustain a conviction.<sup>257</sup> In any event the defence could by reasonable diligence have uncovered Mrs. Telford's evidence as they should have been able to infer her existence and to have approached her if they truly

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<sup>252</sup> *R v Lawless*, unreported, Full Court of the Supreme Court of Victoria, 10 May 1978, Transcript. See further the discussion in Lane, W, "Prosecutors: Non-Disclosure of Exculpatory Evidence" [1981] 5 Crim LJ 251 at 259-261.

<sup>253</sup> Lush J and O'Bryan J delivered separate judgments. Young CJ agreed with both his colleagues.

<sup>254</sup> Transcript, 22.

<sup>255</sup> In relation to the note of the conversation with Mrs. Joyce I would respectfully question this conclusion. Surely it was relevant and potentially admissible for the purpose of cross-examination.

<sup>256</sup> Transcript, 56. *Lucas* is a reference to the strong minister of justice view expressed in *R v Lucas* [1973] VR 693.

<sup>257</sup> It is significant that the majority judges of the High Court offered various scenarios as to the reasons that the jury could still have arrived at a verdict of guilty notwithstanding the effect of Mrs. Telford's statement. With respect to their Honours this is the type of appellate speculation that the High Court subsequently in *R v Mallard* (2005) 224 CLR 125 at 134-135 stated was impermissible for the West Australian Court of Appeal to have resorted to in order to uphold a conviction in the face of the prosecution's non-disclosure of relevant unused material.

wished to call her at trial.<sup>258</sup> The members of the High Court differed as to whether the statement of Mrs. Telford should have been disclosed to the defence. Barwick CJ considered that it would have been better for the prosecutor to have informed the defence of the identity of Mrs. Telford as she had seen something of the events in question. However, consistent with both *Bryant and Dickson* and *Van Beelen*, that was the extent of the prosecution’s obligations. The Chief Justice commented:

It is good practice, in my opinion, in general for the prosecution to inform the defence of the identity of any witness from whom a statement in the possession of the prosecution has been obtained. But, clearly, in my opinion, there is no obligation of any kind resting on the prosecution to provide the defence with a copy of such a statement.<sup>259</sup>

[5.7.7] Stephen J absolved the prosecutor from any direct criticism and was satisfied that the withholding of the statement was neither an act of misconduct or impropriety nor even “a conscious act designed to prejudice the defence.”<sup>260</sup> Nevertheless, His Honour did accept that “it would certainly have been better” had the statement’s existence been revealed to the defence.<sup>261</sup> Aickin J did not consider the issue. Mason J commented that he “did not condone the failure of the Crown to give the defence any information about Mrs. Telford’s statement.”<sup>262</sup> However, his Honour went on to observe: “it must be acknowledged in the present case that there is no rule of law which compels the Crown to provide the defence with statements made by persons it does not propose to call as witnesses.”<sup>263</sup>

[5.7.8] Murphy J offered a typically forthright dissenting opinion. His Honour was emphatically of the view that the statement of Mrs. Telford was significant. It was impossible to reconcile her account with that of Mrs. Joyce and went both to the credibility and the veracity of her account. Whether there were one or two men present at the shooting was a very material point. There was no excuse for the non-disclosure of the statement by the prosecutor. Murphy J impliedly raised the minister of justice role of the prosecutor and stated:

Those prosecuting on behalf of the community are not entitled to act as if they were representing private interests in civil litigation. The prosecution’s suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial. Even if the prosecution could be excused for not making Mrs. Telford’s statement available to the applicant earlier, it could not be excused for failing to do so after the applicant had attempted to show from Mr. Telford

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<sup>258</sup> Her husband had been a prosecution witness and he had mentioned being home with his wife that night. This approach is contrary to that of cases such as *R v Livingstone* [1993] Crim LR 597 where the proposition that the defence were aware, or could have been aware, of the item’s existence and could have sought the items themselves was held to be an insufficient answer to non-disclosure by the prosecution. As the High Court later made clear in *R v Grey* (2001) 184 ALR 593 at 599-600, the defence are not be required to “fossick for information” to which they are entitled.

<sup>259</sup> (1978) 142 CLR 659 at 667.

<sup>260</sup> (1978) 142 CLR 659 at 673.

<sup>261</sup> (1978) 142 CLR 659 at 674.

<sup>262</sup> (1978) 142 CLR 659 at 678.

<sup>263</sup> (1978) 142 CLR 659 at 678. See further Part 3 of Chapter 8 at [8.3.14] for a discussion of *Lawless* in the context of any prosecutorial “duty” in calling witnesses.

and Mr. Goldsworthy [the two residents who had given evidence] that another person was present. In my opinion, the verdict of guilty was brought about by conduct which departed from the standard required of those prosecuting on behalf of the community.<sup>264</sup>

[5.7.9] At least one commentator at the time expressed his preference for the view of Murphy J over that of the majority.<sup>265</sup> Indeed, I would submit that Murphy J was correct in his approach and that subsequent developments would support his position in *Lawless*.<sup>266</sup> But in 1979, notwithstanding the dissenting opinion of Murphy J and the widespread criticisms of the majority decision,<sup>267</sup> it is important to appreciate that the majority judgments in *Lawless* did not provide any support for any suggestion that the prosecution was subject to a wide duty of disclosure. Indeed, the comments of the majority in *Lawless* clearly militated against the existence of any such duty.

[5.7.10] It is significant to note that, even at the time of *Lawless*, powerful misgivings were being expressed in Australia as to the lack of any formal disclosure regime and the consequent potential for injustice. Indeed, prompted by the experiences that he had encountered in connection with the trial of *Lawless*, Justice Beach offered the following recommendation for the introduction of a comprehensive and formal duty of disclosure:

However, in light of what occurred in the *Lawless* matter, in my opinion police should be directed to supply to the coroner (where appropriate) and to the Crown, all statements of whatever kind obtained from witnesses to a particular offence, whether they be in conflict with one another or not, and the Crown should be obliged to make available to the defence copies of all such statements. That the interests of justice require that such a full disclosure of the contents of all witnesses' statements be made to the defence has been made abundantly clear to me...That experience impels me to state emphatically that legislation should be urgently enacted to overcome the inhibiting effect of the decision contained in *R v Charlton*.<sup>268</sup>

However, this call was to go unheeded, not just in Victoria,<sup>269</sup> but across Australia for at least another decade and a half.

[5.7.11] The issue of disclosure was to remain largely dormant in Australia throughout the 1970s and early 1980s.<sup>270</sup> However, there was academic criticism of the state of the

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<sup>264</sup> (1978) 142 CLR 659 at 682.

<sup>265</sup> See Lane, above n 252, 266.

<sup>266</sup> As will be seen from later decisions in Australia, the dissenting view expressed by Murphy J in *Lawless* would be likely to accord with modern authority on this issue.

<sup>267</sup> See Lane, above n 252, 256; Hunter and Cronin, Ch 1, n 59, 208 and Hunter *et al*, Ch 4, n 19, 737-738.

<sup>268</sup> Beach, B, *Report of the Board of Inquiry into Allegations Against Members of the Victorian Police Force (Volume 1)* (Melbourne, Government Printer, 1978) p 115.

<sup>269</sup> In true bureaucratic fashion the Victorian Government commissioned a further Committee of Inquiry, this time into Beach's recommendations. This Committee subsequently concluded that no legislation was necessary on the issue of disclosure, see Norris, G, *Police Procedures Relating to the Investigation of Crime (Part 1)* (Melbourne, Government Printer, 1978) p 195. See further Skelton, R, and Shiel, F, "The Myth of the Clean Police Force," *The Age*, 12 June 2004.

<sup>270</sup> Though there were occasional decisions that raised the issue such as *R v Easom* (1981) 28 SASR 134 or even more occasional decisions that granted some measure of disclosure of unused material such as *R v Perry (No1)* (1981) 27 SASR 172.

law and calls for greater transparency in disclosure.<sup>271</sup> Despite the apparent absence of wrongful convictions due to non-disclosure, by the late 1980s, perhaps reflecting the dramatic developments in England, there was increasing awareness that the notion of trial by ambush was not permissible in a modern criminal justice system and there were shortcomings with the existing law.<sup>272</sup> There were increasing judicial suggestions of the need for some enhanced and formal duty of prosecution disclosure.<sup>273</sup> The issue was considered in considerable detail by the various state courts, but with no degree of uniformity.<sup>274</sup> It is fair to say that these decisions, whilst agreeing broadly on the need for prosecution candour in disclosure, did not agree on the precise extent of any such duty and took somewhat divergent paths.

[5.7.12] The High Court also considered the issue in 2001 in *R v Grey*.<sup>275</sup> The High Court in *Grey* was critical of the prosecutor’s failure in that particular case to have supplied to the defence material that was clearly relevant at the trial, namely a so-called “letter of comfort”<sup>276</sup> in respect of the main prosecution witness that would have been of considerable assistance to the defence in its cross-examination of that witness.<sup>277</sup> However, it proved unnecessary for the High Court to offer any meaningful contribution to this issue in light of the prudent concession of Mr. Cowdrey, the New South Wales Director of Public Prosecutions, that the item in question should have been provided.

[5.7.13] It is significant, and perhaps not wholly coincidental in light of subsequent developments, that the jurisdiction to insist most strongly on a comprehensive duty of prosecution disclosure was Western Australia.<sup>278</sup> In 1997 in *R v Bradshaw*<sup>279</sup> the West Australian Court of Appeal was called upon to address the obligations of the prosecution

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<sup>271</sup> See Lane, above n 252; Lane, above n 113, 174-192; Elkington, G, “Discovery upon Indictment in New South Wales” (1980) 4 Crim LJ 4 at 26-27; Campbell, I, “Discovery in Committal Proceedings” (1985) 9 Crim LJ 278 at 278-284; Hawkins, above n 156, 101-105 and the Shorter Trials Committee, Ch 4, n 19, 87-93 that raised the issue and criticised the existing law.

<sup>272</sup> See, for example, Mack and Anleu, Ch 4, n 19, 90-91 and Aronson, Ch 4, n 19, 111.

<sup>273</sup> See the call in *R v Lun*, unreported, Court of Appeal (NSW), 4 December 1992 for guidelines in Australia similar to the *Attorney-General’s Guidelines* in England.

<sup>274</sup> See such cases as *Clarkson v DPP* [1990] VR 745, *R v K* (1991) 161 LSJS 135 at 140; *R v Jamieson* (1992) 60 A Crim R 68; *R v Lun*, unreported, Court of Appeal (NSW), 4 December 1992; *R v Higgins*, unreported, Court of Criminal Appeal (Vic), 2 March 1994; *R v CPK*, unreported, Court of Criminal Appeal (NSW), 21 June 1995, No 60330 of 1994; *R v Lewis-Hamilton* [1998] 1 VR 630; *R v Reci* (1997) 70 SASR 78; *R v Garofalo* [1999] 2 VR 625; *R v TSR* (2002) 5 VR 627, *Cannon v Touche* (2002) 5 VR 317; *R v Ulman-Naruneic* [2003] SADC 52 (first instance) and [2003] SASC 43 (appeal) and *R v Grey* (2000) 111 A Crim R 322.

<sup>275</sup> (2001) 184 ALR 593.

<sup>276</sup> This is a confidential document prepared by the police on behalf of an accused for use as mitigation in sentencing that outlines the assistance that the accused has given to the authorities.

<sup>277</sup> (2001) 184 ALR 593 at 598-599.

<sup>278</sup> Why this is so is unclear. Though there are obvious dangers in speculation, the nature and number of cases of alleged non-disclosure in a relatively small jurisdiction such as Western Australia raises the intriguing possibility that this may be symbolic of a wider malaise in law enforcement in that state and as reflective of a “tunnel vision” approach to investigation and prosecution such as had happened in England, see Laurie and Taylor, above n 123. The cases of *R v Button* (2002) 25 WAR 382, *R v Mallard* (2005) 224 CLR 125 and *Western Australia v JWRL* [2010] WASCA would appear to be such examples. See also below n 285.

<sup>279</sup> Unreported, 13 May 1997, West Australian Court of Criminal Appeal, Library No 970228, Transcript.



as regards disclosure. The accused had been convicted of bribery and corruption in the course of his position as a Councillor. He contended that various items held by the prosecution, especially relating to the credibility of two vital prosecution witnesses, had been wrongly withheld at trial. Though these criticisms were rejected by the Court of Appeal it is notable that in stating the prosecutor's duty of disclosure, the court specifically approved and adopted the principles laid down by the English cases such as *Ward*, *Winston Brown* and *Keane*.<sup>280</sup> Of particular significance was the fact that the threefold test governing the relevance of what should be disclosed from *Keane* was specifically endorsed. Malcolm CJ considered that, "In order for there to be a fair trial the Crown is obliged to disclose to the defence all material available to it that is relevant or possibly relevant to an issue in the case."<sup>281</sup> This exacting duty of disclosure extended not only to disclosure of any relevant material in the prosecutor's possession, but included an obligation to make enquiries to determine if any disclosable material existed and to ensure its preservation. Indeed, as in many of the English cases,<sup>282</sup> if material was available to the prosecution in the sense that its existence was known to the police, then the accused remained entitled to it, whether or not it was known to the prosecuting lawyer. Though the conviction was upheld on the facts of the case,<sup>283</sup> the breadth of the proposition adopted by Bradshaw CJ is obvious.

[5.7.14] It appears surprising that Malcolm CJ in *Bradshaw* made no reference to any of the earlier Australian authorities such as *Lawless* or *Van Beelen*. Indeed, the Chief Justice largely confined his brief discussion on disclosure to the English authorities. His Honour offered no explanation as to why the Court of Appeal had suddenly seen fit to embrace the English approach to disclosure, arguably in defiance of the views expressed by the majority of the High Court in *Lawless*, and certainly against the whole trend of past Australian authority and experience. Though there may well have been sound policy factors in favour of the drastic change adopted by Malcolm CJ, it is not entirely satisfactory that over a century of prior practice and authority should be overlooked and the wide English duty of disclosure imposed upon the prosecution without real explanation or discussion of the reasons for its imposition in Australia.<sup>284</sup>

[5.7.15] Nevertheless, whatever doubts may be entertained as to the foundations of the views expressed by Malcolm CJ in *Bradshaw*, a number of subsequent decisions in Western Australia have also adopted and applied the wide English approach to disclosure, embraced in *Bradshaw*.<sup>285</sup> These cases also unequivocally adopted the pre

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<sup>280</sup> The Chief Justice quoted, with apparent approval, a passage from *Archbold*, stating the prior CPIA law on disclosure as had existed in England. Following *Bradshaw* this must have been taken as representing the law in West Australia.

<sup>281</sup> (*R v Bradshaw*), Transcript, 9-11.

<sup>282</sup> See *R v Taylor & Taylor* (1994) 84 Cr App R 361 for an application of this in England. See further the discussion in Part 2 of Chapter 6.

<sup>283</sup> Even on a wide view the undisclosed material in *Bradshaw* was peripheral and ultimately irrelevant.

<sup>284</sup> It is certainly surprising that a case as important as *Bradshaw* is not even formally reported.

<sup>285</sup> See *R v WK* [2002] WASC 176 (conviction upheld), *R v Button* (2002) 25 WAR 382 (conviction quashed due to non-disclosure and other factors), *R v Mallard* (2003) 28 WAR 1 (conviction upheld by Court of Appeal), *R v Easterday* (2003) 143 A Crim R 154 (conviction quashed due to non-disclosure), *R v Beamish* [2005] WASCA 62 (conviction quashed due to non-disclosure and other factors), *Western Australia v Cooley* [2005] WASCA 160 (non-disclosure of relevant information but on facts conviction upheld), *R v White* [2006] WASCA 62 (non-

CPIA law as expressed in England.<sup>286</sup> In 2002 in *R v WK*<sup>287</sup> Miller J summarised the law applying in Western Australia:

In *Buller v R* Malcolm CJ stressed that the duty of the Crown with respect to disclosure in order to ensure a fair trial is of the utmost importance. It is a duty to be scrupulously observed in order to ensure that an accused has a fair trial. The duty to disclose certainly extends to all material available to the Crown which is relevant or possibly relevant to any issue in the case. That was made clear in *R v Bradshaw*...<sup>288</sup>

Miller J went on to emphasise that “these principles are of universal application to all cases.”<sup>289</sup>

[5.7.16] It is also notable that recently the courts in New South Wales, albeit with more considered and persuasive reasoning than that displayed in *Bradshaw*, have now also embraced the law from England in relation to disclosure and *Keane* has now been accepted as representing the law governing what is required to be disclosed by the prosecution.<sup>290</sup>

## **Part 8: *R v Mallard*: Confirmation in Australia of the Duty of Disclosure**

[5.8.1] The decisions in Western Australia and the recent decisions in New South Wales form the immediate backdrop to the decision of the High Court in 2005 in *R v Mallard*.<sup>291</sup> *Mallard* is comparable to *Ward* in that its significance extends to illustrating the apparent partisan approach to disclosure adopted by both the police and prosecution counsel in that case and in establishing, or at least, confirming, the nature and extent of the prosecution’s duty of disclosure in Australia.

[5.8.2] The accused had been convicted in Western Australia of the brutal murder of a female jeweller in her shop in May 1994.<sup>292</sup> The deceased had been beaten to death with a

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disclosure of relevant material but conviction upheld), *Western Australia v Narkle* [2006] WASCA 113 (conviction quashed due to non-disclosure), *Western Australia v D* (2007) 179 A Crim R 377 (no material non-disclosure), *Western Australia v Carney* [2010] WASCA 90 (non-disclosure of relevant information accepted by prosecution but on facts conviction upheld and *Western Australia v JWRL* [2010] WASCA 179 (prosecution strongly criticised for adopting partisan role at trial and on appeal and not disclosing important material).

<sup>286</sup> This is the law as stated in *R v Keane* [1994] 2 All ER 478.

<sup>287</sup> [2002] WASC 176.

<sup>288</sup> [2002] WASC 176 at [12].

<sup>289</sup> [2002] WASC 176 at [13].

<sup>290</sup> *R v Reardon (No 2)* (2004) 146 A Crim R 475 at 489, *R v Livingstone* (2004) 150 A Crim R 117 at 126-127 and *R v Spiteri* [2004] NSWCCA 321 at [20].

<sup>291</sup> (2005) 224 CLR 125. Gummow, Hayne, Callinan and Heydon JJ delivered a joint judgment. Kirby J delivered a separate judgment concurring in the eventual result. See Egan, C, “A Murderer No More,” *The Australian*, 22 February 2006, p 13, and Ackland, R, “When the law provides no justice, call a reporter,” *Sydney Morning Herald*, 10 October 2008, for an overview of the entire case.

<sup>292</sup> For an overview of the facts of the case see Dunford, J, *Report of the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs. Pamela Lawrence, the Prosecution and Appeals of Mr. Andrew Mallard, and Other Related Matters* (Perth, Crime and Misconduct Commission, 2008) Ch 1-3.

heavy instrument that was never recovered. The prosecution case partly rested upon various admissions that the accused was said to have made in a number of less than coherent<sup>293</sup> interviews with the police. The accused explained in interview that he had used a "wrench" from a shed at the back of the store to carry out the murder and had drawn a sketch of the presumed murder weapon with the word "Sidchrome" on it.<sup>294</sup> Only one of these interviews had, somewhat oddly, been taped by the police. Various witnesses had seemingly placed the accused (or at least a man of his description) in or about the shop at or about the time of the murder. There was no forensic or scientific evidence linking him to the crime. Mallard in many ways fitted the profile of the "usual suspect."<sup>295</sup>

[5.8.3] It transpired after the trial that the defence had not been provided with various items of unused material by the prosecution.<sup>296</sup> The most significant items concerned various tests carried out by an expert on a pig's head that undermined any assertion that a wrench, especially the one sketched by the suspect, had been used to commit the murder. Though the West Australian Court of Appeal had perfunctorily dismissed the significance of all these items,<sup>297</sup> it is notable that they all fitted uneasily, if not inconsistently, with the prosecution case.<sup>298</sup> Kirby J commented that the undisclosed material was "contradictory" or, at the very least, "highly inconvenient and troubling" to the prosecution case.<sup>299</sup> The High Court was critical of the prosecution's failure to provide these items to the defence. The majority joint judgment observed:

...[the] accused has been denied an opportunity to explore and exploit forensically [the prosecution evidence]. The body of unrepresented evidence so far mentioned was potentially highly significant in two respects. The first lay in its capacity to refute a central plank of the prosecution case with respect to the wrench. The second was its capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for the strength of that case was heavily dependent on the reliability of the confessional evidence, some of which was inexplicably not recorded, although it should have been recorded.<sup>300</sup>

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<sup>293</sup> It is relevant that some of the assertions and claims made by Mallard in interview were dismissed by the joint judgment as "highly fanciful, indeed incredible" (2005) 224 CLR 125 at 132. See also Dunford, above n 292, 37 at [173], 46 at [209] and 141-143 at [615]-[629].

<sup>294</sup> The suspect asserted at trial that he had never admitted to murdering the deceased with any weapon and his drawing of the wrench was simply to fit the "theory" of the murder the police officers had conveyed to him.

<sup>295</sup> Mallard was a petty criminal with a mental disorder, see Dunford, above n 292, 31-33, [138]-[152] and Egan, above n 291.

<sup>296</sup> The prosecutor's duty of disclosure is clearly not dependent upon he or she being in actual possession of the material or even knowing of its existence. It is enough if it is in the hands of the police, see *R v Taylor & Taylor* (1994) 84 Cr App R 361. See further the discussion in Part 2 of Chapter 6.

<sup>297</sup> *R v Mallard* (2003) 28 WAR 1 at 22.

<sup>298</sup> The danger of so called "tunnel vision" and the presence of that factor as an explanation for, at least some of, the historical miscarriage of justice cases in England have been briefly noted already, see above n 123. These dangers are arguably heightened when the prosecution case is heavily dependent upon disputed confession evidence such as in *Kiszko* (see above n 124) or *Mallard*.

<sup>299</sup> (2005) 224 CLR 125 at 157. See also Dunford, above n 292, 144 at [635].

<sup>300</sup> (2005) 224 CLR 125 at 135.

[5.8.4] The undisclosed items were plainly in the possession and knowledge of the police. A subsequent investigation by the Crime and Misconduct Commission highlighted the failings of the police investigation and found that the actions of the two principal officers involved in the case amounted to “misconduct.”<sup>301</sup> It was clear that the police had adopted a “tunnel vision” approach and had confined their investigation almost solely to matters which appeared to inculpate Mallard and ignored any other avenues of investigation that might exculpate or cast doubt on Mallard’s guilt.<sup>302</sup> The Commission was critical of the fact that the police had compiled false records of their investigation and had concealed various items from both prosecution counsel and the defence that undermined their theory that Mallard was the killer.<sup>303</sup> The Commission was particularly critical of the “fundamentally improper” manner in which the police had procured vital eye witnesses and a scientific witness to make “significant alterations” to their accounts so that matters that did not relate to Mallard were made to appear to relate to him.<sup>304</sup> “This turned a very weak case against him [Mallard], depending entirely on the so called admissions of a person who clearly had mental problems, with their proved inaccuracies and inconsistencies, into a much stronger case.”<sup>305</sup>

[5.8.5] As in *Ward*, however, the partisan approach arguably extended beyond the police to prosecution counsel, a Mr. Bates. It is not entirely clear to what extent the prosecution lawyer(s) were aware of, or in possession of, the material never furnished to the defence that undermined the case against Mallard.<sup>306</sup> The majority judgment in the High Court considered it was unnecessary to investigate this issue.<sup>307</sup> Kirby J was more explicit. His Honour commented that at least some of the undisclosed material was “certainly known” to the prosecuting lawyer(s) and all of the items “would have been available” to the DPP’s office.<sup>308</sup> This issue was considered in greater length by the Crime and Misconduct Commission. Though Mr. Bates had conducted the trial on the basis that the wrench was the murder weapon, the Commission was satisfied that Mr. Bates was aware of at least the wrench tests on the pig’s head. However, Mr. Bates had refrained from raising this issue at trial in examination in chief with the expert witness. The Commission noted this “fundamental omission” and “had difficulty in accepting that it was an accident or due to oversight.”<sup>309</sup> Rather the Commission considered that the “most likely explanation” was that Mr. Bates had realised there were problems with the identification of the murder weapon “and decided to avoid the issue as much as possible.”<sup>310</sup> The Commission

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<sup>301</sup> See Dunford, above n 292, 77-81 at [327]-[337], 83-85 at [355]-[364], 85-100 at [365]-[443] and 105-109 at [463]-[480].

<sup>302</sup> See *Ibid*, 146 at [644]. See also 29-30 at [134]-[136], 38-39 at [178]-[181] and 75-77 at [317]-[326].

<sup>303</sup> *Ibid*, 86 at [368]. See further *Ibid*, Ch 7.

<sup>304</sup> The original accounts, which would have been of benefit in cross-examination, were among the material never furnished to either the defence or prosecution counsel.

<sup>305</sup> *Ibid*, 86 at [368].

<sup>306</sup> See Egan, above n 291.

<sup>307</sup> (2005) 224 CLR 125 at 132-133.

<sup>308</sup> (2005) 224 CLR 125 at 149.

<sup>309</sup> Dunford, above n 292, xxiv at [60].

<sup>310</sup> *Ibid*, 122 at [541].

considered that this appeared to constitute a breach of Mr. Bates' professional duty to prosecute a case "fairly, impartially and in a competent manner."<sup>311</sup> The Commission was also critical of Mr. Bates' failure to adhere to his duty to disclose to the defence the result of the pig's head testing of the wrench.<sup>312</sup> Though the Commission was careful not to suggest that Mr. Bates had deliberately sought to pervert the course of justice,<sup>313</sup> it considered that his actions in relation to both not raising the wrench issue with the expert witness (after conducting the prosecution case on the basis that a wrench was the murder weapon) and in failing to disclose the results of the pig's head tests amounted to "misconduct"<sup>314</sup> and "involved a breach of the trust placed in him by reason of his employment as a public officer."<sup>315</sup>

[5.8.6] It was conceded by the prosecution on appeal to the High Court that the non-disclosure of at least some of the items described above breached the guidelines of the Director of Public Prosecutions *Statement of Prosecution Policy and Guidelines* that had been made and gazetted pursuant to the *Director of Public Prosecutions Act 1991* (WA).<sup>316</sup> These guidelines aside, the joint judgment briefly, but crucially, noted that the decision of the High Court in *R v Grey* was authority "for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused person, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty."<sup>317</sup> Their Honours commented that the undisclosed material in the present case was no less probative than the letter of comfort that had not been disclosed in *Grey*. The undisclosed material in *Mallard* was of "significant forensic value."<sup>318</sup>

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<sup>311</sup> *Ibid*, 123 at [549] quoting Rule 16.1 of the *Professional Conduct of Rules* of the Law Society of Western Australia

<sup>312</sup> *Ibid*, xxiv at [61] and 122 at [543].

<sup>313</sup> Bates received many references to his high ethical and professional standing, see *Ibid*, 122 at [544].

<sup>314</sup> *Ibid*, 123 at [549] and 124 at [550].

<sup>315</sup> *Ibid*. Bates denied before the Commission that he had aimed for a conviction over his wider obligation as a prosecutor but accepted he had "fallen short" of what had been required. He blamed a heavy workload for his omissions. See Kappelle, L, "Prosecutor 'fell short' in Mallard case," *The Sydney Morning Herald*, 15 November 2007. Bates and the two police officers censured by the Crime and Misconduct Commission for their role in *Mallard* subsequently resigned on full pensions with disciplinary proceedings unresolved, see Perpitch, N, "276K for Mallard Prosecutor," *The Australian*, 28 July 2009.

<sup>316</sup> These Guidelines had required the disclosure of any relevant unused material, see now *Statement of Prosecution Policy and Guidelines* 2005 (WA), p 20 at [111]-[112] (police) and p 20 at [113] (prosecution lawyers). It is significant to note that almost all other Australian jurisdictions now also possess similar official guidelines from their DPP in respect of disclosure; see Guideline 6 of the *Guidelines for Prosecutors* (ACT), Guideline 8.1 of the *Prosecution Policy of the Commonwealth* and the *Disclosure Policy* (Cth) available at: <http://www.cdpp.gov.au/Publications/DisclosurePolicy/>, Guideline 18 of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (NSW), Guidelines 8.1 and 8.4(ii) of the *Prosecution Guidelines* 2005 (NT), Guideline 27 of the *Director's Guidelines* (Qld), Guideline 9 of the *Statement of Prosecution Policy and Guidelines* (SA) and Guidelines 1.7, 5.0, 5.2.1 and 5.2.20 of the *Prosecution Policy and Guidelines* 2010 (Vic). See further Hinton, above n 171, 123-128. Tasmania surprisingly does not appear to have any such official policy and the *Prosecution Guidelines* (Tas) make no reference to disclosure. Given the importance of full and frank disclosure in the modern criminal justice system, it would appear both timely and appropriate for the Tasmanian Parliament and/or the Tasmanian DPP to establish such official guidelines.

<sup>317</sup> (2005) 224 CLR 125 at 133.

<sup>318</sup> (2005) 224 CLR 125 at 141.

[5.8.7] Kirby J in a separate judgment commented that the DPP guidelines, despite having the status of a statutory instrument and, in theory, prevailing over the common law, were not designed to exclude the operation of the common law.<sup>319</sup> Rather they “were intended to express, clarify, elaborate and make public the ‘longstanding prosecution policy’ that had developed conformably with the common law.”<sup>320</sup> His Honour noted that the law in Australia had developed from the decisions in *Lawless* and *Grey*. It was also illustrative and useful to consider the approach that had been taken in other common law jurisdictions on the issue of prosecution disclosure. Indeed, Kirby J noted that the jurisprudence of common law jurisdictions,<sup>321</sup> the *European Convention of Human Rights* and international law had all increasingly recognised the importance to an accused of knowing any probative material in the hands of the prosecution. There was “an increasingly insistent demand for the provision of material evidence known to the prosecution which is important for the fair trial of the accused and the proper presentation of the accused’s defence.”<sup>322</sup> His Honour adopted the following statement of Lord Hope in *R v Winston Brown*<sup>323</sup> in 1998 as representing an accurate statement of the common law in Australia:

The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. The prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed.<sup>324</sup>

[5.8.8] All the members of the High Court agreed that the prosecution had failed in its clear duty, whether under the DPP’s own guidelines or at common law, to reveal probative material to the defence. In those circumstances the conviction had to be quashed. Though the prosecution case was not without its weaknesses,<sup>325</sup> the High Court considered that the Crown case had not been without its “strengths”<sup>326</sup> and there had been sufficient evidence to sustain the original verdict of guilty.<sup>327</sup> Accordingly a retrial was ordered.<sup>328</sup>

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<sup>319</sup> In this respect in stark contrast to the deliberate but not wholly successful effort of the *Criminal Procedure and Investigations Act* in England to extinguish the common law.

<sup>320</sup> (2005) 224 CLR 125 at 150. It will be noted that Kirby J regarded the DPP guidelines in a similar manner as the courts in England came ultimately to regard the *Attorney General’s Guidelines* of 1981.

<sup>321</sup> Kirby J briefly reviewed the law in the United States, Canada, England, Scotland, the Republic of Ireland, New Zealand and Hong Kong on this issue.

<sup>322</sup> (2005) 224 CLR 125 at 151.

<sup>323</sup> [1998] AC 367.

<sup>324</sup> [1998] AC 367 at 377 quoted by Kirby J (2005) 224 CLR 125 at 153.

<sup>325</sup> (2005) 224 CLR 125 at 132, 141 and 158.

<sup>326</sup> (2005) 224 CLR 125 at 141.

<sup>327</sup> (2005) 224 CLR 125 at 132.

<sup>328</sup> The WA DPP decided not to proceed with a retrial in due course. This was with some apparent reluctance as he declared that Mallard remained the “prime suspect,” see Dunford, above n 292, 133-134 at [579]-[586]. Interestingly, subsequent investigation has strongly suggested that Mallard was in fact wholly innocent and that

[5.8.9] *Mallard* is a crucial decision. Whatever may have been the previous position it is now clear that the prosecution in Australia is subject to a formal and wide duty of disclosure.<sup>329</sup> It is instructive to compare *Lawless* with *Mallard*. Though *Lawless* was not formally over-ruled,<sup>330</sup> it is difficult, if not impossible, to see how *Lawless* can stand alongside *Mallard*.<sup>331</sup> Following *Mallard* the precise origin of the prosecutor's duty of disclosure is irrelevant. It is no longer tenable to rely upon rules of etiquette or informal arrangements stemming from the prosecutor's ethical position in the criminal process as a minister of justice to govern the prosecutor's responsibilities as to disclosure.<sup>332</sup> The prosecutor is manifestly not entitled to act as an adversarial advocate in relation to disclosure. However, it is notable that in formulating or confirming the existence of this duty of disclosure, the High Court seemed unaware of the powerful problems of both practice and principle that have arisen in England as regards the operation of the disclosure regime. The High Court, perhaps somewhat surprisingly given the strength of those problems, made no reference to any issue of either practice or principle that might have a bearing on the performance by the prosecution of its duty of disclosure. Be that as it may, it is now clear following *Mallard* that the role of the prosecutor in respect of disclosure is one of a minister of justice and that any lingering misapprehension that the question of disclosure could be left to be resolved by the prosecutor on an individual and informal basis under the so called "Old Boys Act" has been dispelled.<sup>333</sup>

## **Part 9: "The Golden Rule," The Prosecutor must be a "Minister of Justice" in Disclosure**

[5.9.1] Various rationales have been offered in both Australia and England to account for the modern insistence that an accused be afforded full and frank disclosure of the prosecution case. It has been often stated over recent years that the right of every accused to a fair trial requires that he or she receive both the evidence against him as well

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another man, a convicted murderer called Simon Rochford, was the actual culprit, see Egan, C, "I just want a normal life," [Perth] *Sunday Times*, 14 October 2006 and Dunford, above n 292, 135-137 at [588]-[603].

<sup>329</sup> See further *R v Farquharson* [2009] VSCA 307, *R v Sonnet* [2010] VSCA 315 and *R v AJ* [2010] VSCA 331 where the convictions were quashed due to non-disclosure and retrials were ordered and, in particular, *Western Australia v JWRL* [2010] WASCA 179 at [90] where in a sentence appeal the prosecution was strongly criticised for a "serious departure from proper prosecutorial and professional standards" in not disclosing a prior account of an important prosecution witness that contradicted the prosecution case theory.

<sup>330</sup> Indeed, there is surprisingly little discussion of *R v Lawless* (1979) 142 CLR 659 in either *Mallard* or *Grey*.

<sup>331</sup> The West Australian Court of Appeal in *R v Mallard* (2003) 28 WAR 1 at 9 noted that the limited duty of disclosure described in *Lawless* and *Van Beelen* differed from the modern statement in *Winston Brown and Keane* of that duty.

<sup>332</sup> See Warren, Ch 2, n 74, 17-18.

<sup>333</sup> Whether the full implications of this drastic proposition have yet filtered through to every prosecutor, police officer or defence lawyer in practice in Australia may well be a different proposition. See, for example, Moynihan, Chapter 1, n 23, 93 (highlighting in 2008 the "pervasive police culture" in Queensland still resisting the modern obligation of disclosure on the basis that "it is not our job to help the defence", see also *Ibid*, 95-97) and the comments of Martin CJ in *Western Australia v JWRL* [2010] WASCA 179 at [91] strongly criticising the prosecution's partisan and "fundamentally misconceived" approach to its obligation of disclosure adopted in that case which "suggests that there is a continuing misconception within the Office of the Director of Public Prosecutors as to the ambit and significance of that obligation."

as any other material of relevance in the case.<sup>334</sup> Steyn LJ declared that the “right of every accused to a fair trial is a basic or fundamental right” and that in an adversarial process where the police and the prosecutors control the investigatory process, “an accused’s right to fair disclosure is an inseparable part of his right to a fair trial.”<sup>335</sup>

[5.9.2] Alternatively, it has been said that a duty of disclosure is necessary to alleviate or redress the stark imbalance in resources that exists between the typical positions of the prosecution and the accused in the criminal process.<sup>336</sup> The defence is in a disadvantageous position when compared with the prosecution and the duty of disclosure is intended to level the playing field. “Any disadvantage that the accused might potentially suffer as a result of lack of investigative ability and power,” as Sulan J explained in *R v C and Others*,<sup>337</sup> “is overcome or lessened by the obligation of the prosecution to make all relevant material available, including that which may be helpful to the defence.”<sup>338</sup> Though this argument doesn’t command universal support,<sup>339</sup> it has been reiterated elsewhere, even by prosecutors. Martin Blakemore, the former Deputy Director of Public Prosecutions of New South Wales observed:

A phrase often used by judges and defence counsel and resented by Crown Prosecutors is the ‘unlimited resources of the Crown’. It suggests the Crown has unlimited resources to prosecute defendants in any and every trial, which of course it does not. The statement is clearly hyperbole but when compared with the resources of a defendant, even a wealthy defendant, the resources available to the Crown are enormous and multifarious.<sup>340</sup>

[5.9.3] This concept has also, I would suggest not coincidentally, featured in jurisprudence arising from the *European Convention of Human Rights*.<sup>341</sup> This jurisprudence insists that a comprehensive duty of disclosure upon the prosecution is necessary to ensure an “equality of arms” between the prosecution and defence.<sup>342</sup> The courts have even on occasion relied on administrative law notions of natural justice to

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<sup>334</sup> See, for example, *R v Buller* [2002] WASC 90 at [7] per Malcolm CJ, *R v Easterday* (2003) 143 A Crim R 154 at 188 per Sheytler J and *Ragg v Magistrates’ Court of Victoria* (2008) 179 A Crim R 568 at 589.

<sup>335</sup> *R v Winston Brown* [1994] 1 WLR 1599 at 1606 (Court of Appeal). See also *R v Winston Brown* [1998] AC 367 at 374 (House of Lords).

<sup>336</sup> *R v McKenny* (1991) 93 Cr App R 287 at 312. See also *R v Ward* [1993] 1 WLR 619 at 676, *R v Easterday* (2003) 143 A Crim R 156 at 188 and *Ragg v Magistrates’ Court of Victoria* (2008) 179 A Crim R 568 at 581.

<sup>337</sup> [2006] SASC 158.

<sup>338</sup> 2006] SASC 158 at [45].

<sup>339</sup> See, for example, Simon, Ch 4, n 309 1710: “The image of the lonely individual facing Leviathan is misleading...The State has other concerns besides this defendant...It is more plausible to portray the typical defendant as facing a small number of harassed overworked bureaucrats.”

<sup>340</sup> Blakemore, M, “Equality of Arms in an Adversary System,” Conference Paper presented at the International Association of Prosecutors Annual Conference, Cape Town, 4 September 2000, available at: <http://www.odpp.gov.au/speeches/Final%20paper%20Capetown.htm>. See also Hinton, above n 171, 121.

<sup>341</sup> See *Foucher v France* (2000) 30 EHRR 480 at [44], *Kaufman v Belgium* (1986) 50 DR 98 at 115 and *Borgers v Belgium* (1991) 15 EHRR 92 at [26]-[28].

<sup>342</sup> See *Jespers v Belgium* (1981) 27 DR 61 at [51]-[56]; *Rowe & Davis v UK* (2000) 30 EHRR 1 at [60]; *HM Advocate v Sinclair*, *The Times*, 1 June 2005, [2005] UKPC D2 at [33] and *Ragg v Magistrates’ Court of Victoria* (2008) 179 A Crim R 568 at 579-585.



overturn a conviction that has been said to have been obtained in breach of the rules of natural justice when important exculpatory evidence was withheld by the prosecution.<sup>343</sup>

[5.9.4] I would submit that these various justifications for the prosecution's duty of disclosure are essentially all "sides of the same coin." This is that the duty of disclosure is merely another manifestation of the inherent duties of the prosecutor to act in the role of a minister of justice. The question of whether the prosecution's duty of disclosure arises from statute,<sup>344</sup> practice direction,<sup>345</sup> professional rules of conduct,<sup>346</sup> internal DPP guidelines<sup>347</sup> or the common law is, as was suggested by Kirby J in *Mallard*, ultimately academic. The vital proposition is that the duty of prosecution disclosure flows from the fundamental duty of the prosecution as a minister of justice to conduct a criminal trial with fairness.<sup>348</sup> As was explained by Niblett:

All those with any responsibility for the prosecution must act in a fair and impartial manner and the disclosure of relevant information and documents to the defence is only one (albeit a very important one) aspect of that responsibility.<sup>349</sup>

[5.9.5] This aspect of the prosecutor's duty has received explicit judicial acknowledgement on a number of occasions. For instance in 1992 in *R v Berry*<sup>350</sup> the Privy Council adopted,<sup>351</sup> with apparent approval, the following statement of principle of Shelley JA:

The 'right' to see statements in the possession of the prosecution is therefore really a rule of practice described in terms of the ethics of the profession and based upon the concept of counsel for the Crown as a minister of justice whose prime concern is its fair and impartial administration.<sup>352</sup>

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<sup>343</sup> See *R v Leyland Justices, ex parte Hawthorn* [1979] 1 All ER 202, *R v Knightsbridge Crown Court, ex parte Goonatilleke* [1985] 2 All ER 498 and *R v Liverpool Crown Court, ex parte Roberts* [1986] Crim LR 622. The correctness of applying the natural justice rule to criminal trials has been questioned, see *R v Secretary of State for Home Office, ex parte Al-Mehdawi* [1990] 1 AC 876 at 894 per Lord Bridge.

<sup>344</sup> See, for example, s 104 of the *Summary Procedure Act* (SA), s 590AH and s 590AJ of the *Criminal Code* (Qld) and s 95 of the *Criminal Procedure Act* 2004 (WA).

<sup>345</sup> See, for example, the *Attorney-General's Guidelines on Disclosure* 2000 and 2005 and *A Protocol for the Control and Management of Unused Material in the Crown Court*.

<sup>346</sup> See, for example, Rules 66 and 66A of the *New South Wales Barristers' Rules*, Rules A66 and A66A of the *New South Wales Solicitors' Rules*, Rules 9.8 and 9.9 of the *South Australian Barrister Rules*, Rule 141 of the *Victorian Bar Inc Practice Rules Rules of Conduct and Professional Education* and Rules 66 and 66A of the *Australian Bar Association Model Rules*.

<sup>347</sup> See, for example, the references cited above at n 316.

<sup>348</sup> *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568 at 586-587. See also Irwin, M Judge, "Criminal Code Amendments: Rediscovering Criminal Discovery and the Challenges of Disclosure – A Judicial Perspective," p 3-4, available at: [archive.sclqld.org.au/judgepub/2005/irwin220805.pdf](http://archive.sclqld.org.au/judgepub/2005/irwin220805.pdf).

<sup>349</sup> Niblett, above n 43, 13.

<sup>350</sup> [1992] 2 AC 364.

<sup>351</sup> [1992] 2 AC 364 at 374-375 and 376.

<sup>352</sup> (1970) 16 WIR 267 at 268. See also *R v Ward* [1993] 1 WLR 619 at 692, *R v TSR* (2002) 5 VR 627 at 650 and *R v Glennon* [1999] EWCA Crim 1104.

[5.9.6] This point has also been made in Canada. Though the Supreme Court of Canada in 1991 in its landmark decision in *R v Stinchcombe*<sup>353</sup> based its comprehensive duty of prosecution disclosure upon consideration of the *Charter of Rights* in Canada, the Supreme Court has also noted that such a duty existed independently of the Charter. Lebel J in *R v Taillefer*<sup>354</sup> remarked that, “The prosecutor’s duty to disclose to the defence all relevant evidence arises naturally from the Crown Attorney’s role as an officer of the court in our criminal justice system.”<sup>355</sup> A similar view was expressed by L’Heureux-Dubé J in *R v O’Connor*.<sup>356</sup> Her Honour explained that, “full and fair disclosure is a fundamental aspect of the Crown’s duty to serve the Court as a faithful public servant, entrusted not with winning or losing trials but rather with seeing that justice is served.”<sup>357</sup>

[5.9.7] There is simply, as was made so clear at the expense of the hapless Mr. Spencer in *R v Livingstone*,<sup>358</sup> no place in an area as crucial as disclosure for the partisan or tactical considerations as were demonstrated in *O’Farrell*, *Livingstone*, *Ward* and *Mallard*. As was noted as long ago as 1982 in the Canadian case of *R v Jannison and Kennedy*<sup>359</sup> by Vannini DCJ:

... there is no room in the administration of criminal justice for the jockeying of positions, either by the Crown who acts as a Minister of Justice or by the defence and with respect to the defence, it is entitled to full disclosure of all the evidence in the possession of the Crown which may be material.<sup>360</sup>

[5.9.8] The experience of disclosure in England over the last two decades has proved problematic and controversial (as the next Chapter will consider in more detail). There are regular and ongoing vocal complaints from both sides of the disclosure debate as to the operation and basis of the disclosure regime. Statutory intervention has failed to resolve these issues. It is readily apparent that it is easier said than done to arrive at a scheme governing disclosure in practice that is fair, efficient and effective. However, despite the powerful problems of both principle and practice in relation to the operation of the disclosure regime in England, two fundamental propositions are clear.

[5.9.9] Firstly, whatever one’s views may be about the present statutory model in England or the short lived model at common law post *Ward* and *Keane*, it is obvious that there can be no return to either the doctrine of “trial by ambush” as demonstrated by cases such as *Holland* or the informal “Old Boys Act” approach to disclosure. In particular, the issue of disclosure is simply too important and crucial to the integrity of the criminal process to leave to vague and informal personal arrangements. Disclosure simply cannot be left to “the sense of fairness, and the demanding nature or otherwise, of the individual

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<sup>353</sup> (1991) 68 CCC (3d) 1.

<sup>354</sup> (2004) 233 DLR (4d) 227.

<sup>355</sup> (2004) 233 DLR (4d) 227 at 257.

<sup>356</sup> (1995) 130 DLR (4<sup>th</sup>) 235.

<sup>357</sup> (1995) 130 DLR (4<sup>th</sup>) 235 at 284.

<sup>358</sup> [1993] Crim LR 597.

<sup>359</sup> (1982) 62 CCC (2d) 481.

<sup>360</sup> (1982) 62 CCC (2d) 481 at 486-87. See also in this context *R v Livingstone* [1993] Crim LR 597.

prosecutor.”<sup>361</sup> The defendant's entitlement to disclosure, as Mack and Anleu assert, “should not depend on informality and on good relations with the police and prosecutor.”<sup>362</sup> It is now widely accepted that, as LeBel J reiterated in 2004 in *R v Taillefer*,<sup>363</sup> “The way in which the disclosure of evidence was viewed in the past – as an act of goodwill and co-operation on the part of the Crown- played a significant part in catastrophic judicial errors.”<sup>364</sup> There can be no escape now from an open and formal system of disclosure. As was noted by Butterfield J, “The criminal justice system now operates, and must in my view continue to operate, in a landscape of transparency as far as disclosure is concerned.”<sup>365</sup>

[5.9.10] Secondly, the “golden rule” of full disclosure is unquestionable having regard to the long and unfortunate legacy of cases such as *Ward* and *Mattan* and *Livingstone* and *Mallard*. The Court of Appeal in 1998 in *Mattan* in offering its “very profound regret”<sup>366</sup> (belatedly one might assert) that the accused in that case had been wrongly convicted and hanged in 1952 for a murder when crucial evidence undermining the prosecution case had been withheld from disclosure,<sup>367</sup> observed that the case demonstrated that “injustices of this kind can only be avoided if all concerned in the investigation of crime, and the preparation and presentation of criminal prosecutions, observe the highest standards of integrity, conscientiousness and professional skill.”<sup>368</sup> In the context of the prosecution's duty of disclosure this translates into the “golden rule” of full disclosure as was highlighted in 2004 in *R v H*<sup>369</sup> by Lord Bingham:

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown

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<sup>361</sup> Independent Commission Against Corruption, *Report on Investigation into the Use of Informers (Volume 1)* (Sydney, ICAC, 1993) p 71. See also Findlay (2009), above n 120, 159-161.

<sup>362</sup> Mack and Anleu, Ch 4, n 19, 89.

<sup>363</sup> (2004) 233 DLR (4<sup>th</sup>) 227.

<sup>364</sup> (2004) 233 DLR (4<sup>th</sup>) 227 at 236. Canada has also had its fair share of high profile wrongful convictions attributable to prosecution non-disclosure, see, for example, Royal Commission on the Donald Martin Jr Prosecution, *Findings and Recommendations (Vol 1)* (Halifax, The Commission, 1989); *Reference Re: Nepoose* (1992) 71 CCC (3d) 419; Kaufman, F, *Report of the Commission on Proceedings Involving Guy Paul Morin (Vol 1 and 2)* (Toronto, Attorney-General of Ontario, 1998) and *Re: Morin* (1995) 37 CR 9(4<sup>th</sup>) 395 and Cory, P, *Report of The Inquiry Regarding Thomas Sophonow* (Winnipeg, Manitoba Justice, 2001). See also Epp, above n 119, 412-442.

<sup>365</sup> Butterfield, above n 159, 263.

<sup>366</sup> *The Times*, 5 March 1998 (otherwise unreported); Court of Appeal, 24 February 1998, No: 9706415/S2, Transcript: Smith Bernal Reporting Limited, p 9.

<sup>367</sup> *Mattan* was a black seaman who had been convicted of the murder of a storekeeper during a robbery. The undisclosed material held by the police not only fatally undermined the prosecution case but suggested that another man had been the culprit. *Mattan* was the last man hanged in Wales. His counsel described him in his closing address as “a half child of nature, a semi-civilised savage” prompting *Mattan*'s wife to later comment that defence counsel had proved to be the best witness the Crown could have called. See further *The Times*, 5 March 1998, and Tibballs, above n 124, 280-284.

<sup>368</sup> Transcript (*R v Mattan*), 10.

<sup>369</sup> [2004] 2 AC 134.

that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.<sup>370</sup>

[5.9.11] The “golden rule” is to insist on full disclosure by the prosecution. It may be difficult (as the next Chapter will consider) to arrive at a practical scheme that is entirely satisfactory to meet this requirement but I would suggest that no one can now seriously dispute the underlying premise behind Lord Bingham’s insistence on full disclosure. Though the precise practices and experiences in Australia and England regarding disclosure may differ, the fundamental proposition that emerges in respect of disclosure is clear. The appropriate role of the prosecutor in this vital area is not that of a partisan or adversarial advocate. Disclosure is not a sort of tactical tit for tat or a game of “Happy Families.” The prosecutor’s role, with respect to disclosure at least,<sup>371</sup> is firmly and unequivocally that of a minister of justice. It is impossible to improve upon the following definition provided by Lord Brennan QC in describing the appropriate role of the prosecutor in this area:

The prosecutor must act as a minister of justice, presenting the prosecution evidence fairly, making full disclosure of relevant material and ever conscious that prosecution must not become persecution.<sup>372</sup>

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<sup>370</sup> [2004] 2 AC 134 at 147.

<sup>371</sup> Though not necessarily with respect to its choice of witnesses at trial, see further the discussions in Chapter 10 and 11.

<sup>372</sup> See Hong Kong Department of Justice, above n 1.

# CHAPTER 6

## PROBLEMS OF PRINCIPLE AND PRACTICE WITH THE PROSECUTOR'S ROLE AS TO DISCLOSURE, A FAIR BUT WORKABLE MODEL: REALISTIC GOAL OR CHIMERA?

*It was argued in Chapter 5 that, although in other areas this might not be the case, the prosecutor's role with respect to disclosure must be that of the candid minister of justice. The "golden rule" must be one of full disclosure. Accordingly, the real controversy in relation to disclosure is what are the precise boundaries and content of this duty. Though this is a matter that is still being worked out, the development of the prosecution's modern duty of disclosure in England has raised a number of major questions of both principle and practice. These issues will be considered in this Chapter. In particular the issue that has been raised is whether it is either desirable or realistic to expect the prosecuting lawyer, even when acting as a minister of justice, to deal fairly and objectively with issues of disclosure. Though the modern experience of disclosure has proved contentious and difficult in England, it is clear that the prosecutor must now act as a candid minister of justice within some formal disclosure regime. Though it is not without difficulty, it is possible to offer some suggestions about the framework of a formal system of disclosure that is both fair and workable for both England and Australia.*

### **Part 1: Introduction: The need for a Disclosure Regime to be Effective but Fair to All**

"Disclosure rules must have regard to reality in a world where criminal investigations are often lengthy and generate mountains of paperwork; where prosecutors have heavy caseloads and time limits with which to comply, and where defence lawyers have limited time to inspect and digest everything which emerges from an investigation. Disclosure rules must be capable of effective observance and they must be fair – to the investigator, the prosecutor and the defence practitioner; but principally to the accused."<sup>1</sup>

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<sup>1</sup> Niblett, Ch 5, n 43, 36.

[6.1.1] These were the essential criteria that were identified by Niblett for a fair but workable system of disclosure. While the prosecutorial role in this area is, as was shown in the last Chapter, now one of the minister of justice and not a partisan advocate, a number of formidable problems of both principle and practice have arisen in England in dealing with disclosure. Though there is no place in the modern criminal process for the now discredited informal approach to disclosure employed in the past, it has proved frustratingly difficult in practice to devise a formal system of disclosure to replace it that satisfies the deceptively simple criteria proposed by Niblett. The experience of disclosure in England in the almost two decades since the landmark decisions in *R v Ward*<sup>2</sup> and *R v Keane*<sup>3</sup> has demonstrated how problematic and contentious this area of prosecutorial responsibility is. Even legislative intervention in the form of the *Criminal Procedure and Investigations Act* has failed to resolve these issues.<sup>4</sup> As was noted by Justice Butterfield, “the CPIA was intended ... to try to put the genie back in the bottle. In my view the attempt has failed and prosecutors and courts are now faced with the worst of all possible worlds.”<sup>5</sup> The ever present tension of the prosecuting lawyer acting as a minister of justice within an adversarial criminal process has proved especially problematic with respect to disclosure. It is instructive to consider the problems of principle and practice that have arisen in England since the early 1990s to see whether it is possible to devise a system of disclosure that is effective and efficient but still fair, notably to the accused. Given that the post “Old Boys Act” system of disclosure was in operation in England for at least a decade before the landmark Australian High Court decision in 2005 in *R v Mallard*,<sup>6</sup> it is appropriate to consider what, if any, lessons can be applied from the English experience to Australia.

[6.1.2] The problems that have emerged in England in the two decades since the prosecution’s modern duty of disclosure was formulated include:

- the question of who constitutes the “prosecution” for the purposes of disclosure;
- whether in an adversarial system of criminal justice it is either desirable or realistic to entrust either the investigator or the prosecuting lawyer (even in the role of a minister of justice) with the vital task of deciding what is relevant to be disclosed;
- the extent of the prosecution’s duty;
- the practical implications of the modern duty of disclosure;

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<sup>2</sup> [1993] 1 WLR 619.

<sup>3</sup> [1994] 2 All ER 478.

<sup>4</sup> Indeed, it can be argued that statutory intervention, far from remedying the problem has compounded it. For a critical overview of the disclosure regime, see Redmayne, M, “*Criminal Justice Act 2003 (1) Disclosure and its Discontents*” [2004] Crim LR 441 and Ormerod, D, “Improving the Disclosure Regime” (2003) 7 E & P 102-129.

<sup>5</sup> Butterfield, Ch 5, n 159, 256 at [12.28]. It was noted as late as 2008 that, “Many aspects of disclosure remain problematic,” see Her Majesty’s CPS Inspectorate, *A Thematic Review of the Duties of Disclosure of Unused Material* (London, HHCPIS, 2008) p i.

<sup>6</sup> (2005) 224 CLR 125.

- should the defence be given the “keys to the warehouse” and afforded access to any non-sensitive unused material in the prosecution’s possession;
- whether the modern duty of disclosure has proved to be “a charter for the criminal”<sup>7</sup> and allowed manipulative defence lawyers to exploit the system;
- the disclosure of material held by a third party to the proceedings, and
- the particular problem of dealing with claims by the prosecution of public interest immunity.

[6.1.3] There remain unresolved issues and tensions with the various models of disclosure that have emerged in England. The extent of these problems cannot be underestimated. The disclosure obligations have proved burdensome on the prosecution.<sup>8</sup> It is unsurprising that the almost “mantra” like mention of the term “disclosure” by defence lawyers “has almost a frat-house paddle effect to Crown Prosecutors.”<sup>9</sup> Nevertheless, despite such problems it is my argument that certain suggestions can be made about the broad framework of a system of disclosure that meets the criteria identified by Niblett and is both fair and practical. The prosecutorial role in this area, in particular, must be that of a minister of justice and this principle must find practical expression in a comprehensive and formal duty of prosecution disclosure. There can be no place in a modern criminal justice system in this area in either England or Australia for a return to either the prosecutorial role of a partisan advocate or the informal “Old Boys Act” approach. As Connor concludes: “The Crown must be regarded, and must regard themselves, as the trustees of information, not its monopoly owners, if we are to make any progress. The only question for debate should be the terms of that trusteeship.”<sup>10</sup>

## **Part 2: Who is the “Prosecution” for the Purpose of Disclosure: “One Indivisible Entity”?**

[6.2.1] The first issue that arises is who or what constitutes “the Crown” or “the prosecution” for the purposes of disclosure. This issue has never been fully resolved. As Niblett observes, the concept of what constitutes the prosecution “has always been ambiguous, allowing the courts a degree of elasticity in particular cases.”<sup>11</sup> It is simple to say that any prosecuting lawyer (whether directly employed or instructed by the prosecuting agency) and the office of the Director of Public Prosecutions are part of the

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<sup>7</sup> Corker and Parkinson, Ch 5, n 122, 15 at [1.48].

<sup>8</sup> See Goldsmith, Ch 5, n 219, 4, noting that in “heavy cases” up to 80% of the time of prosecution lawyers was taken up by viewing and sorting out unused material. See also McGuinness, J, *et al*, *The Effectiveness of the Current Disclosure Regime and in Large and Complex Cases* (London, Criminal Bar Association, 2005) at [44] quoting the view of Treasury counsel that he routinely spent about 70% of his time in complex cases dealing with issues of disclosure.

<sup>9</sup> Maude, B, “Reciprocal Disclosure in Criminal Trials: Stacking the Deck against the Accused or calling Defence Counsel’s Bluff?” (1999) 37 Albta L Rev 715.

<sup>10</sup> O’Connor, Ch 5, n 103, 476.

<sup>11</sup> Niblett, Ch 5, n 43, 42.

prosecution. But what of material in the possession of the police that is never, whether wittingly or unwittingly, furnished to the prosecuting lawyers? The courts have insisted in a number of cases in both Australia<sup>12</sup> and England<sup>13</sup> that the police are deemed to be part of the “prosecution” for the purposes of disclosure. It is no answer for the prosecution to assert that they cannot disclose something of which the police have never made them aware.<sup>14</sup> As was stated in *R v Bolton Justices; ex parte Scally*<sup>15</sup> by Glidewell LJ, “In those circumstances, while the prosecuting authority as such may not have failed in their duty, the total apparatus of [the] prosecution has failed to carry out its duty to bring before the court all the material evidence.”<sup>16</sup>

[6.2.2] The logic of classifying the police as part of the “total apparatus of the prosecution” for the purposes of disclosure is demonstrated by cases such as *Kiszko*,<sup>17</sup> *Ward*,<sup>18</sup> *Mallard*<sup>19</sup> and *R v Taylor and Taylor*.<sup>20</sup> In all these cases the police withheld from the defence and even the prosecution lawyers vital material that undermined the Crown case. Cases such as *Ward* further held that even an ostensibly independent expert witness retained and instructed by the prosecution is part of the prosecution for the purposes of disclosure.<sup>21</sup> If the courts were prepared to overlook the non-disclosure and/or concealment of significant material by the prosecution simply on the basis that the police or prosecution expert witness had never made the prosecuting lawyer aware of such material, then that would hardly encourage a climate of candour and transparency by investigators and prosecution expert witnesses. It would drive an effective “coach and horses” through the modern insistence on frank disclosure of the prosecution case. It may be simple to classify the police or an expert witness instructed by the prosecution as part of the prosecution but it is unclear how far the “total apparatus of the prosecution” doctrine extends. In *Blackledge*<sup>22</sup> the Court of Appeal offered the startling proposition, seemingly without any considered argument on the issue, that the Crown is a single and

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<sup>12</sup> See *R v Bradshaw*, unreported, 13 May 1997, West Australian Court of Criminal Appeal, No 970228, Supreme Court Library, Transcript, p 9-11; *R v Gray* (2001) 184 ALR 593 and *R v Mallard* (2005) 224 CLR 125.

<sup>13</sup> See *R v Birmingham Crown Court, ex parte Richetts* [1991] RTR 105 at 108 and *R v Taylor & Taylor* (1994) 84 Cr App R 361.

<sup>14</sup> See, for example, *R v Liverpool Crown Court, ex parte Roberts* [1986] Crim LR 622; *R v T (LA)* (1993) 84 CCC (3d) 90; *R v McCarthy*, *The Times*, 21 October 1993, *R v Oliver* (1995) 143 NSR (2d) 134 at [36] and *R v McNeil* [2009] 1 SCR 66 at [24]. Though it is unclear how far the prosecution’s duty of disclosure extends to material in the prosecution’s possession but relating to another case or investigation, see further below n 30.

<sup>15</sup> [1991] 2 All ER 619.

<sup>16</sup> [1991] 2 All ER 619 at 633.

<sup>17</sup> See Chapter 5, n 124.

<sup>18</sup> See further in this context Chapter 5, n 137.

<sup>19</sup> (2005) 224 CLR 125. See further in this context the discussion in Part 8 of Chapter 5 at [5.8.4].

<sup>20</sup> (1994) 98 Cr App R 361.

<sup>21</sup> See Chapter 5, n 137. See also *R v Maguire* [1992] 1 QB 936 and *R v Clark* [2003] 2 FCR 447. Such classification should be unnecessary as any expert witness should regard him or herself as a wholly independent player in the proceedings whose role is to provide objective and unbiased assistance to the court uninfluenced as to form or content by the exigencies of the litigation or the interests of the party instructing the witness, see further *Whitehouse v Jordan* [1981] 1 WLR 246 and *Re:J* [1990] FCR 193.

<sup>22</sup> *R v Blackledge & Ors* [1996] 1 Cr App R 326.



"indivisible entity"<sup>23</sup> for the purposes of disclosure. Any material held by an agency or department of the State or Crown is deemed to be in the possession of the "prosecution" and therefore the prosecuting lawyers are under a duty to disclose such unused material, even if they are ignorant of the existence of such material.<sup>24</sup>

[6.2.3] Niblett doubts the general applicability of this far reaching doctrine.<sup>25</sup> He argues that such an extension of the prosecution's duty of disclosure raises major constitutional and practical issues lying at the heart of modern government. These misgivings are further compounded by the complex and ever increasing plethora of executive agencies and official and semi-official corporations that carry out the myriad tasks entrusted to a modern government.<sup>26</sup> It would be next to impossible to identify just where the "Crown" ended and began for the purposes of disclosure. The proposition in *Blackledge* is arguably explicable by the particular facts of that case.<sup>27</sup> It is also significant that prosecution counsel conceded the point without argument. *Blackledge* has been overruled by statute in England<sup>28</sup> and subsequent cases have not subscribed to the sweeping view of the prosecutor's duty of disclosure stated there and have qualified the notion of the indivisibility of the Crown for the purposes of disclosure,<sup>29</sup> even in relation to material held by the prosecution (whether by the prosecuting lawyer's office or the police) but relating to another unrelated case under investigation.<sup>30</sup> The Supreme Court of Canada in a recent unanimous decision rejected the proposition that all state authorities constituted "a single indivisible Crown entity" for the purposes of disclosure.<sup>31</sup> Such a view the court observed found "no support in law and, moreover, is unworkable in practice."<sup>32</sup> The court

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<sup>23</sup> [1996] 1 Cr App R 326 at 337.

<sup>24</sup> This was the situation in *Blackledge* where prosecution counsel instructed by the Department of Trade and Industry (the DTI) had assured the trial judge that there was no pertinent unused material in the case that supported the defence contention that the British authorities had turned a blind eye to the illegal military exports to Iraq with which the defendants were charged. Though prosecution counsel had personally checked the relevant files held by the DTI he had not been shown the files of other government departments and agencies which did contain material that supported the defence case. The Court of Appeal accepted that prosecution counsel had acted in "good faith" but the collective failure of the "prosecution" to disclose the relevant information to the defence amounted to a "material irregularity" and the convictions were quashed. See also *R v Dunk & Ors* [1995] Crim LR 137.

<sup>25</sup> Niblett, Ch 5, n 43, 43.

<sup>26</sup> *Ibid.*

<sup>27</sup> See above n 24. This view of *Blackledge* was applied in *R v Thomas (No 4)* [2008] VSAC 107.

<sup>28</sup> Corker and Parkinson, Ch 5, n 122, 91 at [7.19].

<sup>29</sup> See, for example, *R v Bretton* (1996) 189 AR 60; *R v W (DD)* (1997) 114 CCC (3d) 506; *R v Stratford Magistrates Court, ex parte Johnson* [2003] EWHC Admin 353; *DPP v Wood*, *The Times*, 8 February 2006 and [2005] EWHC Admin 2986; *R v Murphy* [2006] EWHC Admin 1735 and *R v Thomas (No 4)* [2008] VSAC 107.

<sup>30</sup> See *R v C & Ors* [2001] EWCA Crim 1529, *R v Szerba* [2002] AJ No 915 and the tentative view expressed by Wheeler JA in *R v White* [2006] WASCA 62 at [111] that material held by the police unrelated to the present case under investigation is outside the prosecution's duty of disclosure.

<sup>31</sup> *R v McNeil* [2009] 1 SCR 66 at [13].

<sup>32</sup> *R v McNeil* [2009] 1 SCR 66 at [13]. The notion of the Crown as one single entity for the purpose of disclosure is particularly unworkable in a federal system of government, see *R v Gingras* (1990) 120 AR 300 at [14].

concluded that state entities other than the prosecuting Crown were to be treated as third parties under the disclosure regime.<sup>33</sup>

[6.2.4] The question has been raised whether the victim or another party who is assisting the police or the prosecution is deemed to be part of the prosecution. This issue can occasion difficulty in practice but the general rule is that such parties are not deemed part of the prosecution for the purposes of disclosure and are treated as third parties to the proceedings.<sup>34</sup>

[6.2.5] My argument is, reflecting the sound practical and constitutional limits to the extent of the prosecution’s duty, that disclosure should be confined to material in the possession of the prosecuting lawyers, the investigatory agency and any expert witnesses retained by them. Whilst a firm definition of what constitutes the “prosecution” for the purposes of disclosure may be elusive, the “single indivisible entity” notion from *Blackledge* is inappropriate. If there is significant material potentially held by another government agency, department or party then the solution is not to classify that department, agency or party as part of the prosecution for the purpose of disclosure, but rather to treat it as a third party to the proceedings and to make it subject to the usual rules governing access by summons or subpoena for third party material.<sup>35</sup>

### **Part 3: Can the Prosecution be Trusted with Disclosure: Putting the Fox in Charge of the Hen Coop?**

[6.3.1] A fundamental issue of principle that has been raised by the developments in the law since *Ward* and *Keane* and entrenched by the CPIA is whether in an adversarial criminal process it is either desirable or appropriate to entrust to the prosecution, whether in the form of the police or prosecution counsel, the crucial responsibility of determining what is relevant and should be divulged and what should not. It has been suggested that putting the prosecution in charge of disclosure is tantamount to putting a fox in charge of a hen coop.<sup>36</sup> It has been asserted that it is difficult to reconcile the prosecution’s duty of disclosure with its role as an active advocate within an adversarial criminal system.<sup>37</sup> It is often said that it is unrealistic to expect police officers or prosecution lawyers, even when purporting to act as the strictly objective minister of justice, to discount adversarial or partisan factors.<sup>38</sup> Even though the prosecutor’s paramount role with respect to disclosure is that of the strictly objective minister of

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<sup>33</sup> Though his proposition was qualified by the Supreme Court that the prosecutor’s role as a minister of justice extended to the prosecutor in an appropriate case inquiring further and obtaining known relevant material held by a third party “if reasonable feasible” [2009] 1 SCR 66 at [49]. See further the discussion in Part 10 of this Chapter.

<sup>34</sup> See, for example *Morris v Director of SFO* [1993] Ch 372. See further Part 10 of this Chapter.

<sup>35</sup> See *Hunter et al*, Ch 4, n 19, 743 at [14.36] and *R v Mokbel (Ruling No 1)* [2005] VSC 410 at [39]-[41] and *R v Mokbel (Ruling No 2)* [2005] VSC 502 at [13]. Subpoenas serve a “powerful means of obtaining disclosure in a criminal case, especially in respect of material relevant to credit” (Rolfe, Ch 1, n 25, 8). See further the discussion in Part 10 of this Chapter.

<sup>36</sup> Unnamed “senior barrister” quoted by Emmerson, Ch 5, n 216. See also Part 6 of Chapter 5 at [5.6.17].

<sup>37</sup> McEwan, J, *Evidence and the Adversarial Process* (Cambridge, Blackwell Business, 1992) p 21.

<sup>38</sup> See, for example, Smith, Ch 1, n 7, 390 and Hoeffel, Ch 1, n 45, 1135-1136 and 1147-1149.

justice, it must be borne in mind that he or she discharges this role within an adversarial criminal process where, as discussed in Chapter 4, he or she is also expected to act as an adversarial advocate with a legitimate interest in seeking the conviction of the accused. The tension between these potentially conflicting prosecutorial roles is a general feature of the prosecutor's function within an adversarial criminal process but this tension arises particularly in the discharge by the prosecutor of his or her responsibilities of disclosure.<sup>39</sup>

[6.3.2] The development of the prosecutor's duty of disclosure, as noted by Lord Mustill in *R v Preston*,<sup>40</sup> has exacerbated this tension in prosecutorial roles.<sup>41</sup> The assumption that the prosecution in the discharge of its disclosure duties can discount the adversarial framework in which it operates is questionable.<sup>42</sup> Gardner, drawing on the unhappy experience of prosecution disclosure in the United States,<sup>43</sup> notes, "Prosecutors can, in good faith, downplay or overlook exculpatory evidence because they have difficulty in acting as a 'minister of justice' rather than a 'zealous advocate'."<sup>44</sup> Marshall J in *United States v Bagley*<sup>45</sup> described how this tension would frustrate the capability of even the most scrupulous and attentive prosecutor to discharge his or her duties of disclosure:

At the trial level, the duty of the state to effectuate *Brady*<sup>46</sup> devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes

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<sup>39</sup> Luther, G, "The Frayed and Tarnished Silver Thread; *Stinchcombe* and the Role of Crown Counsel in Canada in Alberta" (2002) 40 Albta L Rev 567 at 569-572.

<sup>40</sup> [1993] 4 All ER 630.

<sup>41</sup> [1993] 4 All ER 630 at 648.

<sup>42</sup> See Burke, Ch 1, n 48, 496-497; Jones, Ch 1, n 46, 764-765; Taylor and Kuo, Ch 5, n 10, 727; and Samuels, A, "Disclosure" (2000) 164 JPN 64.

<sup>43</sup> It is disturbing that prosecution non-disclosure has emerged as one of the principal causes identified for wrongful convictions in the United States, see Kuo and Taylor, Ch 5, n 10, 704-707, Hoeffel, Ch 1, n 45, 1135 and 1148 and Gersham, B, "Prosecutorial Ethics and the Right to a Fair Trial: The Role of the *Brady* Rule in the Modern Criminal Justice System: Litigating *Brady v Maryland*; Games Prosecutors Play" (2007) 57 Case W Res L Rev 531. This non-disclosure has extended to even capital murder cases, see Bedau, H, and Radelet, M, "Miscarriages of Justice in Potentially Capital Case" (1987) 40 Stan L Rev 21 at 56-57. An exhaustive study in 2002 found that 19% of reversals in capital cases in the United States stemmed from the prosecution's failure to disclose exculpatory or mitigating evidence, see Kuo and Taylor, Ch 5, n 10, 704, n 63 and Liebman, J, *et al*, "A Broken System Part II: Why There is So Much Error in Capital Cases and What can be Done About It," 11 February 2002, available at: <http://www2.law.columbia.edu/brokensystem2/index2.html>.

<sup>44</sup> Gardner, M, "An Affair to Remember: Further Refinements of the Prosecutor's Duty to Disclose Exculpatory Evidence" (2003) 68 Mo L Rev 469 at 480.

<sup>45</sup> (1985) 473 US 667.

<sup>46</sup> *Brady v Maryland* (1963) 373 US 83. This is the leading case in the United States in respect of the prosecution's duty of disclosure.

overlook or downplay potentially favourable evidence, often in cases in which there is no doubt that the failure was a result of absolute good faith.<sup>47</sup>

These observations apply equally to the police and prosecution counsel. Their implications for the achievement of full disclosure are explored further below.

## Part 4: Who Should Disclose?

### Part 4(1) The Police

[6.4.1.1] Clearly there may be a strong incentive for the investigator to present or make available only that material which accords with the guilt of the accused and to discount or, in an extreme case, even suppress material that does not accord with the prosecution case.<sup>48</sup> It has been often asserted that the role of the police officer or other investigator is inconsistent with any objective resolution of issues of disclosure and that it is unrealistic to expect the police to pursue an objective and non-partisan investigation.<sup>49</sup> As Samuels notes, “The temptation to take the easy way out is obvious.”<sup>50</sup> Ede’s blunt conclusion is apt: “With the best will in the world police officers have a vested interest in establishing their own case and in not assisting defendants. To expect otherwise is naïve.”<sup>51</sup> Many of the notorious miscarriage of justice cases such as *Matan*, *Kiszko* and *Ward*, as discussed in Chapter 5, bear this out.<sup>52</sup>

[6.4.1.2] This begs the question whether non-disclosure of significant material by the prosecution shown by the historical miscarriage of justice cases remains a problem. One might have expected that in England given the notoriety of the historical miscarriage of justice cases, the current comprehensive obligations imposed by both common law and statute and the prominence accorded to the issue of disclosure that incidents of prosecution non-disclosure would now belong to history.<sup>53</sup> It is frequently suggested that there has been a “sea change” in police and prosecution practices, especially as to disclosure, since the 1970s.<sup>54</sup> As Pollard, a high ranked English police officer, with a frankness not universally shared by his colleagues,<sup>55</sup> explained:

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<sup>47</sup> (1985) 473 US 667 at 696-697.

<sup>48</sup> See, for example, Taylor and Kuo, Ch 5, n 10, 725-727, “Justice”: Criminal Justice Committee, “The Prosecution Process in England and Wales” [1970] Crim LR 668 at 674-675 and Martin, D, “Lessons about the Justice in the ‘Laboratory’ of Wrongful Convictions, Tunnel Vision and the Construction of Guilt and Informer Evidence” (2002) 70 UKMC L Rev 847 at 848.

<sup>49</sup> See, for example, McConville and Baldwin, Ch 4, n 68, 190-192, Quirk, Ch 5, n 242, 46-51, Ede and Shepherd, Ch 5, n 215, 1-2, Taylor and Kuo, Ch 5, n 10, 725-727 and Plontikoff and Woolfson, Ch 5, n 220, 121 and 124-125.

<sup>50</sup> Samuels, above n 42, 64.

<sup>51</sup> Ede and Shepherd, Ch 5, n 215, 111. See also Moynihan, Ch 1, n 23, 93 and 95-97.

<sup>52</sup> See further the references in Chapter 5, n 123.

<sup>53</sup> There are suggestions that the non-disclosure shown in high profile cases such as *Ward* and *Kiszko* was not atypical and was routine in this period, see Chapter 5, n 125.

<sup>54</sup> See, for example, Sanders and Young, Ch 1, n 27, 337. The authors don’t accept this proposition and argue, “We think they do protest too much” (*Ibid*).

<sup>55</sup> See, for example, Evans, Ch 5, n 10.

Prosecution disclosure is an integral part of the adversarial system. Defence lawyers seldom have the resources, skills or inclination to mount an investigation. The timescale between the commission of an offence and identifying a suspect would often prohibit defence investigation in any event. The police are tasked to be impartial investigators responsible for collating facts and preserving evidence, particularly of a forensic nature. It is paramount that the integrity of all material gathered is preserved and that all parties in a case have access to it.<sup>56</sup>

[6.4.1.3] Nevertheless, there has continued to be a worrying incidence of non-disclosure of significant material by the prosecution, especially by the investigatory agency. This is demonstrated by a series of cases where convictions have either been quashed on appeal,<sup>57</sup> or where prosecutions have been stayed as an “abuse of process” or otherwise collapsed,<sup>58</sup> owing to major shortcomings in prosecutorial disclosure. The reasons for non-disclosure in these cases has ranged from the unwitting and almost comical (were it not for the seriousness of the consequences to all parties) administrative oversight<sup>59</sup> to the apparent deliberate suppression of important material.<sup>60</sup>

[6.4.1.4] A number of studies support the view that widespread failings by the prosecution in dealing their modern disclosure obligations continue to occur. It appears that “old habits” die hard. For example, in 2000 Ede and Shepherd in 2000 pointed to two surveys<sup>61</sup> that revealed instances of prosecution non-disclosure that were “staggering in

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<sup>56</sup> Pollard, C, “A Case for Disclosure” [1994] Crim LR 42.

<sup>57</sup> For a far from exhaustive list see *R v Adams* [2007] EWCA Crim 1; *R v Kassir* [2004] EWCA Crim 1812; *R v Mills & Poole* [2003] 1 WLR 2931; *R v McCarthy*, *The Times*, 21 October 1993; *R v Taylor & Taylor* (1994) 98 Cr App R 361; *R v Fergus* [1994] 1 Cr App R 313; *R v Rasheed*, *The Times*, 20 May 1994; *R v Dunk & Ors* [1995] Crim LR 137; *R v Blackledge & Ors* [1996] 1 Cr App R 326; *R v Browning* [1995] Crim LR 227; *R v Liverpool Crown Court, ex parte Moss* [1996] EWHC Admin 223; *R v Glennon* [1999] EWCA Crim 1104; *R v Tandy*, Court of Appeal, unreported, 18 January 2000, No 199905037/Z3; *R v Doubtfire* [2000] EWCA Crim 101; *R v Jackson* [2000] Crim LR 377; *R v Vasilou* [2000] Crim LR 845 (cf *R v Underwood* [2003] EWCA Crim 1500); *R v Osei-Bonsu*, [2000] EWCA Crim 3535; *R v Langley* [2001] Crim LR 651; *R v Heggert* [2001] 4 Archbold News 2; *R v Patel & Ors* [2002] Crim LR 304; *R v Higgins* [2002] EWCA Crim 336; *R v Bourimech* [2002] EWCA Crim 2089; *R v Early & Ors* [2003] 1 Cr App R 19; *R v Gell & Ors* [2003] EWCA Crim 123; *R v Hilton* [2003] EWCA Crim 761; *R v Guney* [2003] EWCA Crim 1502; *R v Weaver* [2003] EWCA Crim 2214; *R v Bishop* [2003] EWCA Crim 3682; *R v Cormack* [2004] EWCA Crim 1117 (see also (2004) 148 SJ 511); *R v Smith & Ors* [2004] EWCA Crim 2212; *R v Brady* [2004] EWCA Crim 2230; *R v Warren* [2005] EWCA Crim 659; *R v West* [2005] EWCA 517; *R v McIlfatrick* [2005] EWCA Crim 693; *R v Rogers* [2005] EWCA Crim 2590; *R v Alfrey* [2005] EWCA Crim 3232; *R v Tompkins*, unreported, Court of Appeal, 4 November 2005; *R v Hadley & Ors* [2006] EWCA Crim 2544; *R v O* [2007] EWCA Crim 2220; *R v Yilmaz & Ors* [2007] EWCA Crim 308 and *Tucker v CPS* [2008] EWCA Crim 3063.

<sup>58</sup> See *R v Ballack & Ors*, unreported, Isleworth Crown Court, 17 November 1999, No T 1999060; *R v Humphreys*, unreported, Maidstone Crown Court, *The Times*, 12 February 2000 (see also Editorial, “Bubble Blowing” (2000) 150 NLJ 209); *R v El Treki* [2000] 8 Archbold News 3; *R v Woolwich Magistrates Court, ex parte DPP* [2001] EWHC Admin 898; *R v Uddin & Ors*, unreported, Southwark Crown Court, 25 May 2005, No T2002-7012; *R v Vocaturo*, unreported, Nottingham Crown Court, 8 October 2007 (see (2007) 157 NLJ 1670); *R v Oliver* [2007] EWCA Crim 220; *Swash v DPP* [2009] All ER (D) 39 and *R v Burnett & Ors*, unreported, Southwark Crown Court, 10 May 2010 (see Osborne, A, “Collapsed BA price-fixing trial places OFT and Virgin in the dock,” *The Telegraph*, 10 May 2010).

<sup>59</sup> See, for example, *R v Bourimech* [2002] EWCA Crim 2089 and *R v Bishop* [2003] EWCA Crim 3682.

<sup>60</sup> See, for example, *R v Brady* [2004] EWCA Crim 2230 and *R v Higgins* [2002] EWCA Crim 336.

<sup>61</sup> See Law Society, *CPIA 1996 Disclosure Provisions Survey* (London, Law Society, 1999) and British Academy of Forensic Sciences and the Criminal Bar Association, *Survey of the Practising Independent Bar into the*

their numbers, in their breadth and in their implications,” and that revealed “serious and fundamental failings of the police service and the CPS to operate the [*Criminal Procedure and Investigations*] Act’s provisions.”<sup>62</sup> These findings are supported by a more recent study by Taylor who argues that the police are still unable or unwilling to disclose relevant information and they continue to view the whole issue of disclosure through a “tunnel vision.”<sup>63</sup> Taylor suggests that information that does not fit the police investigation case theory may be downplayed, withheld or even concealed.<sup>64</sup> Taylor asserts that these failings go beyond managerial or bureaucratic failings and are of an institutional nature.<sup>65</sup>

[6.4.1.5] The English experience does not inspire confidence in the prosecution’s ability to deal fairly and effectively with questions of disclosure. The present statutory regime may be an improvement on the “Old Boys Act,”<sup>66</sup> but it is clear that the English experience of disclosure has proved problematic.

#### Part 4 (2): Prosecuting Counsel: Theoretical Considerations

[6.4.2.1] Can similar criticism as leveled at the police or investigator also be directed at the prosecuting lawyer? Opinions on this issue are divided. There is a view that the prosecutor, especially in his or her role as a minister of justice, can be trusted to deal impartially and fairly with questions of disclosure. After all both the courts<sup>67</sup> and Parliament<sup>68</sup> have seen fit to entrust the assessment of relevance and what falls for disclosure to the prosecutor. Further, the notion of the objective prosecutor dealing fairly with disclosure is a central premise of the whole disclosure regime.<sup>69</sup> “The primary duty in relation to disclosure rests upon the Crown,” as was noted by Phillips LJ in *R v Law*<sup>70</sup> who added that, “the Crown should be trusted to perform their duties properly.”<sup>71</sup> In *R v*

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*Operation in Practice of the Criminal Procedure and Investigation Act 1996 Disclosure Provisions* (London, BAFS, 1999).

<sup>62</sup> Ede and Shepherd, Ch 5, n 215, 8. See also Auld, Ch 2, n 333, Ch 10 at [163]-[165]; HMCPSI (2000), Ch 5, n 221, Ch 1 at [1.6]; Plotnikoff and Woolfson, Ch 5, n 220, 19, Quirk, Ch 5, n 242, 50-51, HMCPSI (2008), above n 5, 5-9 and 97-102 and Binns, J, and Corker, D, “False Economies” (2008) 158 NLJ 17 for similar criticisms.

<sup>63</sup> See Taylor (2006), Ch 5, n 237 and Taylor, C, “Advance Disclosure and the Culture of the Investigator; The Good Idea That Never Quite Caught On?,” Paper presented at the 19th Conference of the Australian and New Zealand Society of Criminology Conference, Hobart, 7-9 February 2006, available at: [http://www.brad.ac.uk/acad/management/external/pdf/workingpapers/2006/Booklet\\_06-21.pdf](http://www.brad.ac.uk/acad/management/external/pdf/workingpapers/2006/Booklet_06-21.pdf).

<sup>64</sup> See Taylor, above n 63, 11 and Kuo and Taylor, Ch 5, n 10, 725-727. This tendency was prominent in the historical miscarriage of justice cases, see Chapter 5, n 123.

<sup>65</sup> Taylor (2006), above n 63, 11-12.

<sup>66</sup> See Redmayne, above n 4, 460-461. Though given the serious failings of the “Old Boys Act,” as discussed in Part 4 of Chapter 5, it is hardly suitable to use it as a suitable model for comparison.

<sup>67</sup> See *R v Bromley Magistrates’ Court, ex parte Smith* [1995] 4 All ER 146 at 151-153; *R v Law*, *The Times*, 15 August, 1996 and *R v B* [2000] Crim LR 50. For a differing view see below at [6.4.2.3].

<sup>68</sup> In the *Criminal Procedure and Investigations Act 1996* in both its original and amended forms.

<sup>69</sup> See Goldsmith (2005), Ch 5, n 219, 23.

<sup>70</sup> *The Times*, 15 August 1996.

<sup>71</sup> *The Times*, 15 August 1996.

*Bromley Magistrates' Court, ex parte Smith*<sup>72</sup> Simon Brown LJ urged defence lawyers to put aside any suspicions about the prosecution withholding relevant material and expressed the "hope that those representing defendants will not too readily seek to challenge a responsible prosecutor's assertion that documents in his considered view are not material."<sup>73</sup> Furthermore it is difficult to identify who else would undertake the task of assessing relevance. It is said that neither the court<sup>74</sup> nor the defence<sup>75</sup> are realistically in a position to do this.

[6.4.2.2] Nevertheless, trust in the prosecution is far from universally shared. Grossman, for example, shares the reservations expressed by Marshall J,<sup>76</sup> and asserts that the longstanding conflict between the prosecutor's roles as a minister of justice and adversarial practice is such that it is unrealistic to expect prosecutors to fulfill their disclosure obligations:

There can be no question that, as a paragon, the notion of an 'ideal' prosecutor [as a minister of justice] is both admirable and necessary. Nevertheless, it must be recognized that prosecutorial practice and legal fiction are irreconcilable. Proceeding on the assumption that every practicing practitioner will fulfill his or her role as a paragon of justice ignores the hard realities that have dominated the criminal justice system since long before the 'ideal' prosecutor was conceived.<sup>77</sup> To simply assume that all prosecutors will exercise their pre-trial disclosure discretion as ministers of justice, ignores the adversarial underpinnings of the entire prosecution process. Moreover, it ignores the prosecutor's working relationship with the police, the resource constraints inherent in the prosecutorial branch of the justice system, the prosecutor's own career objectives, the admitted practices of prosecutors and, most importantly, the distinction between demi-god and mortal. That being said, clearly the fair exercise of prosecutorial discretion in disclosure matters cannot be assumed.<sup>78</sup>

[6.4.2.3] This view has been expressed elsewhere.<sup>79</sup> Some lawyers and academics assert that the CPIA, and by implication the previous *Keane* model, "asks prosecutors to undertake a task for which, like the police, they are neither trained nor suited."<sup>80</sup> The CPS

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<sup>72</sup> [1995] 4 All ER 146.

<sup>73</sup> [1995] 4 All ER 146 at 152.

<sup>74</sup> It is not the trial judge's task to trawl through the unused material to see if there is anything that the prosecution or defence might wish to use, see *R v B* [2000] Crim LR 50 and *R v Howes* [2007] All ER (D) 99.

<sup>75</sup> In many adversarial systems the investigatory work carried out by the defence lawyer in preparation of his or her client's case is "negligible," see Kirching, K, "Disclosure in the Irish Criminal Process: Justice and Informality" (1998) 6 ISLR 17, n 18. See further below at [6.10.2]-[6.10.3].

<sup>76</sup> (1985) 473 US 667 at 696-697, see above at [6.3.2].

<sup>77</sup> As Grossman suggests the tension between the prosecutor's minister of justice and adversarial roles can be traced back to the earliest development of the minister of justice role, see Grossman, Ch 1, n 249, 346-347. See further the discussion in Part 9 of Chapter 2.

<sup>78</sup> *Ibid*, 348-349.

<sup>79</sup> See, for example, Redmayne, above, n 4, 443; Burke, Ch 1, n 48, 494 and 496-497 and Jones, Ch 1, n 46, 764-765 and 778-779.

<sup>80</sup> Quirk, Ch 5, n 242, 52.

is often criticized, both in general terms for being too close to the police,<sup>81</sup> and in specific terms for simply adopting without question the police view as to disclosure in a particular case and for being unable or unwilling to exercise an impartial consideration of the issue.<sup>82</sup> It is argued that the prosecutor’s role within an adversarial criminal system, even as a minister of justice, is such that it is wrong to expect the prosecutor to deal with questions of disclosure on an impartial basis and to be able to assess effectively what may or may not assist the defence case.<sup>83</sup> This was the apparent rationale of cases such as *Ward* or *Saunders* which suggested that it was not for the prosecution to determine questions of relevance as regards unused material. Though this proposition was soon discarded in England once the scale of the burden that this might have placed on the judiciary became apparent,<sup>84</sup> there has not been universal judicial support for the notion that the prosecution should be entrusted with determining the relevance of unused material. Lord Hutton CJ, for example, in the Northern Irish case of *R v Harper and Ahthy*<sup>85</sup> in 1994 declared that it would be “illogical” to hold, following *Ward*, that it was wrong for the prosecution to judge itself whether an item should be withheld on the basis of public interest immunity but that it would be right for the prosecution to be a judge in its own cause on the issue of whether an item was “material and would be of help to the defence.”<sup>86</sup> This theme was echoed and expanded by Carney J of the High Court of Ireland in *DPP v Special Criminal Court and Ward*.<sup>87</sup> The prosecution in a high profile murder case was in possession of highly sensitive material that it was unwilling to divulge.<sup>88</sup> Prosecution counsel had assured the Special Criminal Court that he and junior counsel had considered this material with “great care” and that in their “professional opinion” they were clear that the material would have been of “no assistance” to the defence.<sup>89</sup> Carney J dismissed such assurances:

Two propositions seem to me to be so obvious and fundamental under our system of constitutional law and adversarial justice that I propose simply to state them and move

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<sup>81</sup> See McConville, M, Sanders, M, and Leng, R, *The Case for the Prosecution* (London, Routledge, 1991) p 124-147 and 205-208 and Baldwin and Hunt, Ch 4, n 79, 521-522. Though it is notable that in other jurisdictions issues such as corruption or political partiality are regarded as more pressing than the “closeness” between the police and the prosecuting lawyers. “Commentators in other jurisdictions tend to regard disquiet about cosy relations between police and crown prosecutors as a rather quaint English obsession,” see *Ibid*, 521, n 1.

<sup>82</sup> See, for example, Emmerson, Ch 5, n 216, Quirk, Ch 5, n 242, 51-55 and Plontikoff and Woolfson, Ch 5, n 220, 51 and 125-126. A particular problem is that overworked prosecutors simply don’t have the time to deal properly with questions of disclosure, see *Ibid*.

<sup>83</sup> See, for example, Quirk, Ch 5, n 242, 52-53 and Deal, C, “*Brady* Materiality Before Trial: The Scope of the Duty to Disclose and the Right to Trial by Jury” (2007) 82 NYU L Rev 1780 at 1803.

<sup>84</sup> See Niblett, Ch 5, n 43, 79-80.

<sup>85</sup> Unreported, Belfast Crown Court, 6 December 1994, Transcript. See also the similar view of Henry J in *R v Saunders & Ors*, unreported, 29 August 1988, Central Criminal Court, No T881630, Transcript, p 6D.

<sup>86</sup> Unreported, Belfast Crown Court, 6 December 1994, Transcript.

<sup>87</sup> [1999] 1 IR 60.

<sup>88</sup> This case involved the highly publicised “underworld” murder of a Dublin journalist, Veronica Guerin. The precise nature of this information was not made entirely clear but it must have been of a highly sensitive nature. Prosecution counsel made clear that, notwithstanding the gravity of the alleged offence, the prosecution would rather drop the entire case against Ward than release the information if ordered to do so.

<sup>89</sup> [1999] 1 IR 60 at 66.



on. They are: 1. There can be no question of any member of An Garda Siochana<sup>90</sup> deciding that any material might be withheld from disclosure to the Court or the defence. 2. There can be no question of Counsel or solicitor for the prosecution deciding what material might or might not be of assistance to the defence.<sup>91</sup>

[6.4.2.4] Though the Supreme Court of Ireland on appeal suggested that Carney J “may have gone further than he intended”<sup>92</sup> in his remarks, I would suggest that Carney J highlighted a very significant question, namely whether in an adversarial criminal system it is appropriate to entrust either the police (even assuming they adopt Pollard's candid approach to disclosure) or the prosecution lawyer (even if acting as a minister of justice) to assess what is or is not relevant to the defence. Ultimately it is unwise to place the “fox in charge of the hen coop.”

## Part 5: Practical Implications

[6.5.1] Even if the prosecuting lawyer can be trusted as a minister of justice to sift through the case with the necessary objectivity, it is necessary to consider the practical implications involved in the task. Both the sheer mass of the material that may be in the possession of the prosecution (however, that is defined) and the difficulty in determining what is or not “relevant” (however, that is defined) may pose major practical problems.

[6.5.2] The sheer scale of a modern investigation cannot be overestimated. The case of *R v Browning*,<sup>93</sup> referred to in the last Chapter, highlights how demanding the task of sifting through a voluminous case to assess relevance on behalf of the defence is.<sup>94</sup> Though few cases will exceed the dimensions of the celebrated fraud trial in *R v Saunders* arising from the Guinness takeover of Distillers,<sup>95</sup> (the case that arguably first gave rise to the prosecution's modern duty of disclosure in England), it is far from unusual, especially in the modern digital age,<sup>96</sup> to encounter complex cases that place great strain on any system of disclosure.<sup>97</sup> The trial at Nottingham Crown Court in 2002 of several

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<sup>90</sup> The Republic of Ireland's police force.

<sup>91</sup> [1999] 1 IR 60 at 66. An appeal to the Supreme Court was dismissed.

<sup>92</sup> *Ward v Special Criminal Court* [1999] 1 IR 60 at 87. The Supreme Court held that prosecution counsel acting as a minister of justice must have a role in disclosing relevant material to the defence and also in raising claims of public interest immunity without the court having necessarily to examine the documents in question itself.

<sup>93</sup> [1995] Crim LR 227.

<sup>94</sup> See the discussion in Part 6 of Chapter 5 at [5.6.9].

<sup>95</sup> The trial took 113 days and the preparation of defence counsel occupied some 1000 hours. The documentation in the case was so massive that had it been stacked up the pile would have been 50 feet high!

<sup>96</sup> Advances in technology have accelerated the complexity of criminal investigations and the amount of material generated, see Goldsmith Ch 5, n 219, 8. The growth in “proactive” intelligence led policing has also contributed to the complexity of modern criminal investigations, see *Ibid*, 8-9 and Kirching, above n 75, 17, n 1.

<sup>97</sup> The recent case of *R v Huntley* (unreported, 5 November 2003) at the Central Criminal Court in 2003 provides a similar example of the scope of a modern investigation and the sheer mass of unused material that can be produced. The police investigation into the murder of two young girls generated 6820 witness statements, 7341 exhibits and 24,000 documents. At the peak of the investigation 160 police officers were involved and there were nine officers who dealt purely with questions of disclosure. One of the two junior counsel involved in the case had to give up usual practice and worked almost full time at the police station in order to deal with issues of disclosure. See Cresswell, A, *R v Huntley: CPS Enquiry* (London, Crown Prosecution Service, 2004).

defendants charged as a result of a murder in *R v Sutherland and Others*<sup>98</sup> is illustrative. The trial judge, Newman J, observed that the investigation had generated, as was commonly the case in His Lordship’s experience, “thousands of documents” as unused material. This unused material included 30 files containing 15,000 pages, 12 files containing further documents and files with transcripts of some 700 hours of covert surveillance which had all been provided by the prosecution to the defence. There were also “many thousands” of additional documents at the police station that had not been provided which had taken three defence representatives two weeks to go through.<sup>99</sup> It is unsurprising that Newman J remarked, “If one wanted to find a paradigm case for demonstrating the difficulties [with unused material], this case illustrates the faults in the system.”<sup>100</sup> There have been similar recent complex criminal investigations and trials in Australia.<sup>101</sup> Such cases are far removed from the comparatively simple cases of past times.<sup>102</sup>

[6.5.3] It is clear that such complex investigations and trials will challenge the practical operation of any system of disclosure. The notion that the prosecution lawyer can only make disclosure decisions based on personal inspection and knowledge of all the material gathered in a complex case is unrealistic. This was acknowledged by the Alberta Court of Appeal in *R v Siemens*.<sup>103</sup> The court held that whilst prosecution counsel bore “the ultimate responsibility for decisions regarding relevance and disclosure of evidence in the possession of the Crown,”<sup>104</sup> this did not include a requirement that prosecution counsel must personally examine and catalogue every item that had been gathered by the police in the course of their investigation. The imposition of any such duty “would create an impossible situation” and would cause “the system to grind to a halt.”<sup>105</sup> The court accepted that prosecution counsel might rely on information provided by police officers or others with the duty of distilling information and providing it to prosecution counsel.<sup>106</sup> Though this premise has been criticized as involving an abdication of the

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<sup>98</sup> Unreported, Nottingham Crown Court, 29 January 2002, No T20027203, Transcript: Cater Walsh & Co.

<sup>99</sup> Transcript, 6.

<sup>100</sup> *Ibid.*

<sup>101</sup> See, Chin, J, and Barnes, L, *The Price of Justice?: Lengthy Criminal Trials in Australia* (Sydney, Hawkins Press, 1997, p 1-4, 13-20 and 44-46. A recent example of such a case is *R v Benbrika & Ors*. The trial at the Supreme Court of Victoria of 12 defendants accused of terrorist offences lasted six months. There were 27 barristers involved in the trial and the jury deliberated for 23 days. The exhaustive police investigation covered 18 months and generated 402 eight hour surveillance shifts by the police and 224 by ASIO. There were 16,400 hours of recordings including 98,000 telephone intercepts of which 62,968 related to the 12 defendants. These were eventually whittled down to 482 which were played at the trial and of which just three were arguably pivotal to the prosecution case. See Hughes, G, “Lies, Bombs and Jihad,” *The Australian*, 16 September 2008.

<sup>102</sup> See Shorter Trials Committee, Ch 4, n 19, 1-2. See also below n 119. For an illustration, see the ten day fraud trial in 1847 in *R v Barber & Ors* that was noted as being the longest until then ever heard at the Central Criminal Court. Five eminent prosecution counsel were retained, the indictment was described as covering 30 skins of parchment, the expenses of prosecution counsel were 5600 pounds and “the counsels’ briefs occupied about three thousand sheets of paper,” see “Trial of WH Barber,” *The Courier*, 12 June 1847, p 4. Even *Barber* doesn’t compare with modern cases such as *Saunders* or *Sutherland*.

<sup>103</sup> (1998) 122 CCC (3d) 552.

<sup>104</sup> (1998) 122 CCC (3d) 552 at 562.

<sup>105</sup> (1998) 122 CCC (3d) 552 at 562.

<sup>106</sup> (1998) 122 CCC (3d) 552 at 562-563. cf *R v Sansom* (1991) 92 Cr App R 115 at 123.

responsibilities of the prosecution lawyer,<sup>107</sup> it is explicit in the operation of the English system of disclosure (which accords a prominent role to the police to assist with determining relevance) and it is difficult, as accepted in *Siemens*, to insist upon prosecution counsel in a complex case examining each and every item of unused material. However, this problem could be overcome if the defence had access to all the material gathered by the prosecution in the course of its investigation (excepting material genuinely attracting public interest immunity) and determined relevance on behalf of their client.<sup>108</sup>

## Part 6: Tests for Disclosure: a Recipe for Confusion?

[6.6.1] The width of the various tests that have been suggested for determining what falls for disclosure has compounded the difficulty of the prosecution task. This is the case in respect of all the tests formulated to date including the almost unlimited “free for all” contemplated by *Guinness* and *Ward*, the slightly narrower<sup>109</sup> but still wide test of relevance stated in *Keane* and even the test provided by the CPIA. The test of relevance propounded in *Keane* is particularly worthy of scrutiny. Not only did that test arguably survive the introduction of the ostensibly more restrictive test of the CPIA,<sup>110</sup> but it has also proved influential in Australia.<sup>111</sup>

[6.6.2] In considering the implications of the wide *Keane* test of materiality of disclosure in criminal cases it is appropriate to look at the experience in civil litigation of the similarly broad test of relevance in the context of discovery.<sup>112</sup> In *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co*<sup>113</sup> (commonly known with merciful brevity as *Peruvian Guano*). Brett LJ provided the following oft-quoted definition of what was required by a rule requiring discovery of any document “relating to matters in question”:

It seems to me that every document relates to matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose,

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<sup>107</sup> See, for example, *Luther*, above n 39, 582-583.

<sup>108</sup> See further the discussion in Part 8 of this Chapter

<sup>109</sup> See *R v Seymour* [1996] Crim LR 512 and *R v Winston Brown* [1994] 1 WLR 1599 (material going to the credibility of a defence witness outside duty of disclosure); *R v Cannon*, unreported, Court of Appeal, 30 January 1995, Transcript: John Larkin (prosecution cannot be expected to make exhaustive enquiries and cannot disclose that of which they are unaware), *R v Filmer* [2006] EWHC Admin 3450 (prosecution disclosure cannot cover every question or refinement of every material issue), *R v K* (1991) 161 LSJS 135 at 140 (not “every speculative and scurrilous rumour”) and *R v TST* (2002) 5 VR 627 at 650 (not every “interesting irrelevancy”).

<sup>110</sup> See *R v Makin* [2004] EWCA Crim 1607 at [30] and Ede, R, and Edwards, A, *Criminal Defence: Good Practice in the Criminal Courts* (2<sup>nd</sup> ed) (London, Law Society, 2002) p 159.

<sup>111</sup> See *R v Reardon* (2004) 146 A Crim R 117 at 127 and *R v Spiteri* [2004] NSWCCA 197 at [17]-[20]. See further the discussion in Part 7 of Chapter 5 at [5.7.17].

<sup>112</sup> The lessons from civil discovery have often been said to be applicable to disclosure in criminal cases, see, for example, Sklansky, D, and Yeazell, S, “Comparative Law without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa” (2006) 94 Geo LJ 683 at 715 and see Moisidis, Ch 1, n 33, 188 and 247.

<sup>113</sup> (1882) 11 QBD 55.

contains information which *may* – not must – either directly *or indirectly* enable the party requiring the affidavit of documents to advance his own case or to damage the case of his adversary...I have put in the words ‘either directly or indirectly’ because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which *may fairly lead him to a train of enquiry* [my emphasis], which may have either of these two consequences.<sup>114</sup>

[6.6.3] This influential<sup>115</sup> test is similar to the threefold test of relevance stated in *Keane*,<sup>116</sup> and like the test in *Keane*, it has proved problematic in modern times.<sup>117</sup> Lord Woolf, in his landmark report into English civil legal procedure, explained the unsatisfactory results arising from the continued application of the *Peruvian Guano* test:

The test laid down by Brett LJ is a sophisticated one, more readily applied to the limited number of documents which were being considered by the Court of Appeal in that case than to the vast bulk of documents which have to be considered by parties and their advisers in connection with the complex litigation of the present time.<sup>118</sup> It distinguishes between direct and indirect relevance. It is the inclusion in the test of documents which are indirectly relevant which causes most of the present problems.

The result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.<sup>119</sup>

[6.6.4] Further, the *Peruvian Guano* test can be misused by civil litigants in a calculated effort to wear down their opponents.<sup>120</sup> It has now been discarded in England<sup>121</sup> and some Australian jurisdictions<sup>122</sup> and a narrower definition of relevance substituted.

[6.6.5] Lord Woolf’s comments are arguably equally expressive of the recent English experience of disclosure in the criminal jurisdiction. It is acknowledged that there are arguments against transposing principles and experiences from civil litigation to the criminal arena. Different interests are at stake in criminal litigation where the defendant

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<sup>114</sup> (1882) 11 QBD 55 at 63.

<sup>115</sup> The *Peruvian Guano* test for discovery has been applied in both Australia (see *Beecham Group Ltd v Bristol-Myers Co* [1979] VR 273 and *Wellcome Foundation Ltd v VR Laboratories (Aust) Pty Ltd* (1980) 42 FLR 266 at 269) and England (see *Evans v Chief Constable of Surrey* [1988] QB 588).

<sup>116</sup> [1994] 2 All ER 478 at 484.

<sup>117</sup> Sampford, C, *et al* (eds), *Educating Lawyers for a Less Adversarial System* (Leichardt, Federation Press, 1999) p 53. See further Law Commission, *Reforming the Rules of General Discovery (Preliminary Paper 45)* (Wellington, Law Commission, 2001).

<sup>118</sup> *Peruvian Guano* was decided, as was noted in *Nichia Corp v Argos Ltd*, “a long time ago when no-one had the quantities of paper they have now” [2007] EWCA Civ 7412 at [45].

<sup>119</sup> Woolf, H, *Access to Justice* (London, HMSO, 1996), p 167.

<sup>120</sup> See Ipp, D, “Reforms to the Adversarial Process in Civil Litigation: Part 2” (1995) 69 ALJ 790 at 793-794.

<sup>121</sup> See Rule 31.6 of the *Civil Procedure Rules*.

<sup>122</sup> See, for example, Rule 211(1)(b) of the *Uniform Civil Procedure Rules* (Qld); Part 23, Rules 2 and 3 of the *Supreme Court Rules* 1970 (NSW) and *Practice Note No 14*, “Discovery” (1999) 84 FCR 153.

runs the risk of punishment which may include the loss of reputation, property or liberty<sup>123</sup> that exceeds the risks ordinarily attendant upon the outcome of civil litigation.<sup>124</sup> Nonetheless, the lessons learnt from the open ended test of discovery in civil litigation and the observations of Lord Woolf are apposite to the recent experience of disclosure in English criminal cases.<sup>125</sup> In both the civil and criminal arenas "one of the banes of modern litigation has proved to be excessive discovery. It leads to delay in the proper trial of the issues and it accumulates cost out of all proportion to the necessity."<sup>126</sup> As Lord Goldsmith, in term similar to Lord Woolf, observed in 2005:

...it is now an almost inevitable part – or so it seems – of every large [criminal] case and many others to insist on disclosure of large quantities of material which it is said the prosecution or – just as often – some third party has...In short, disclosure problems occur in cases on an almost daily basis. They lead to lengthy pre-trial correspondence and lengthier court hearings. The problems increase the cost of cases going through the criminal justice system, reduce confidence and result in inconsistency, confusion and injustice. Too often the trial is about the process and not the evidence.<sup>127</sup>

## Part 7: Knowledge of Defence Case

[6.7.1] Even if trusted as a minister of justice to sift through available material with the necessary objectivity, is in a position to be able to assess with any degree of accuracy what is relevant to the accused in a criminal case. The prosecution may not even know the broad defence that is to be mounted at trial, let alone the precise nature of such a defence or the finer cross-examination of a prosecution witness.

[6.7.2] One view is that in the normal criminal case it should present little, if any, difficulty for the prosecutor to be able to assume what defences are likely to be raised in any situation. As was noted by the editor of the *New Law Journal* in 1992:

...is there any hard evidence that the prosecution is being ambushed on a regular or even irregular basis? Any self respecting member of the CPS, if he or she is really worth a right of audience before a jury, let alone a police officer out of training school, must be able to work out in advance what defences there are available in any given situation. Take a case of GBH, for example. What ambush can there be which is not foreseeable. Alibi? That must already be disclosed. Self-defence. It was Tommy and not me. I was drunk and can't remember what happened. ...Indeed, what has the questioning in the police station been all about? Of course, once in a lifetime there will be a real *coup de theatre* such as threat of Martian attack which caused the knifing but such a defence is one for the doctors anyway. And in a case of dishonest handling? It wasn't stolen. I got it from my aunt Gladys. I didn't know it was there. It was planted. Perm any three from four. There is no

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<sup>123</sup> Or even of life in a jurisdiction such as the United States that retains the sanction of capital punishment

<sup>124</sup> Zucker, A, "Public Interest Immunity – A Matter of Prime Judicial Responsibility" (1994) 57 Mod LR 703 at 720.

<sup>125</sup> See Moisisidis, Ch 1, n 33, 169-199, especially 188.

<sup>126</sup> *Mortgage Express Ltd v S Newman and Co* [2000] PNLR 298 at [23] per Stuart Smith LJ.

<sup>127</sup> Goldsmith, Ch 5, n 219, 6-8

real justification from the shift in position away from the making the prosecution prove the case against the defendant.<sup>128</sup>

[6.7.3] This view is not untenable. So-called “ambush” defences which take the prosecution completely by surprise are rare in practice.<sup>129</sup> By far the majority of defendants who exercise their right to silence in interview eventually plead guilty or are convicted after trial.<sup>130</sup> Some commentators consider, as did a former Director of Public Prosecutions of Victoria, that the risk of “the ambush defence may be more rhetorical than real.”<sup>131</sup> Given that ambush defences are rare and the prosecution knows its own case, its strengths and weaknesses and what must be proved, one might assume it should not be difficult for any competent prosecutor to anticipate any potential defences and thus to determine the significance of any unused material. If the accused has volunteered his version of events in interview, which occurs in the “vast majority” of criminal cases,<sup>132</sup> one might assume the prosecutor’s tasks will be even easier. Since the enactment in the *CPIA* in 1996 of the requirement that the accused divulge his or her intended defence and identify the issues he or she intends to challenge in the prosecution case, the English prosecutor should be in an informed position from which to assess what is relevant in any particular case and will need to be disclosed.

[6.7.4] Nevertheless, the view expressed by the editor of the *New Law Journal* in 1992 may be overly simplistic and it has not always been borne out by the English experience of disclosure since the early 1990s. The assumption that the prosecutor, even if acting as a minister of justice, will be able to anticipate the likely defence and determine the relevance of material in its possession to the defence case is questionable. As Birch noted in 1995:

It [the identification of material relevant to the defence case] requires considerable forethought and perhaps even ingenuity on the part of the prosecution. Categorisation of

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<sup>128</sup> Editorial, “Unacceptable Disclosure” (1992) 142 NLJ 1529.

<sup>129</sup> See Law Reform Commission (NSW), *The Right to Silence (Discussion Paper No 41)* (Sydney, Law Reform Commission, 1998) at [3.46] quoting English surveys on the issue that found only 1.5-5 % of defendants mounted “ambush” defences.” See further Leng, R, “The Right to Silence Debate” in Morgan, D, and Stephenson, G, (eds) *The Right to Silence in Criminal Investigations* (London, Blackstone Press, 1994) p 28-30; Dixon, D, *Law in Policing: Legal Regulation and Police Practices* (Oxford, Clarendon Press, 1997) p 234 and Brown, D, *PACE Ten Years On: A Review of the Research* (London, Home Office, 1997), p 184-185. The position in Australia appears similar, see, for example, Scrutiny of Acts and Regulation Committee, *The Right to Silence: Report* (Melbourne, Parliament of Victoria, 1999) at [2.3.3]. cf Law Reform Commission (NSW), *The Right to Silence (Research Report No 10)* (Sydney, Law Reform Commission, 2000) at [3.64]-[3.65].

<sup>130</sup> See Grier, S, “The Right to Silence, Defence Disclosure and Confession Evidence” (1994) 21 Jour Law & Soc 102 at 104-105; Scrutiny of Acts and Regulation Committee, above n 129, at [2.3.3] and Leng, above n 129, 26-29. Leng even found that all the accused whom had raised “ambush” defences at trial were convicted, see *Ibid*, 30.

<sup>131</sup> Flatman, G, quoted by Scrutiny of Acts and Regulation Committee, above n 129, at [2.3.3].

<sup>132</sup> *Ibid*, at [2.3.1]. See also Young and Sanders, Ch 1 n 27, 257 (“It appears few suspects exercise the right of silence in totality”); Leng, above n 129, 19 and 22-28 (only 5% of defendants refused to answer questions) and Pearce, J, and Gudjonsson, G, “Police Interviewing and Legal Representation: a Field Study” (1997) 8 Jour Fam Psy & Psc 200-208 (majority of suspects in a survey where majority had been legally represented in interview not only answered all questions but even admitted their guilt) and Law Reform Commission (1998), above n 129, at [3.30], n 69. The position in Australia appears similar, see Law Reform Commission (NSW), *The Right to Silence (Report No 95)* (Sydney, Law Reform Commission, 2000) at [2.15] (noting “most” suspects answered questions in interview and quoting three Australian studies showing only 4, 7 and 9% of suspects declined to answer questions, see *Ibid*, at [2.16]).

documents as 'material' according to the key passage...imposes on the prosecution counsel almost a duty to turn detective on behalf of the defence in order to decide whether there is anything which might realistically provide a lead. In the light of the prosecution's (necessarily incomplete) knowledge of the stance likely to be taken by the defence this is a tall order.<sup>133</sup>

[6.7.5] It is by no means always possible to anticipate what defence will be mounted at trial.<sup>134</sup> A significant proportion of defendants in Australia<sup>135</sup> and England<sup>136</sup> do not volunteer their version of events in interview and exercise their right, either wholly or partly, to refuse to answer police questions. It is also not uncommon for the defence to put the whole of the prosecution case to strict proof.<sup>137</sup> Such a course of action is unobjectionable.<sup>138</sup> Further, even where the prosecutor might anticipate the broad

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<sup>133</sup> Birch, D, "Commentary [to *R v Keane*]" [1995] Crim LR 226-227. This comment, though predating the CPIA, remains valid in England given the frequent lack of disclosure by the accused of his or her intended defence, see the discussion at [6.7.8]. It is also applicable to Australia, see the discussion at [6.7.9].

<sup>134</sup> An example of this revealed by the Assistant Director of the SFO was the long trial in 1994 of Nazmuddin Virani on charges of false accounting arising from the collapse of the Bank of Commerce and Credit International. This was a vast case of international dimensions. Though the defendant prepared and served a written defence statement some months before the trial, his real defence (a claim that he was dyslexic and didn't know what he had been signing) was not revealed until some way through the trial. See further Kiernan, P, "Lessons from the Past: Practical Lessons from the UK cases," 126<sup>th</sup> International Senior Seminar, Visiting Experts' Papers, 109 at 112 available at: [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no66/F\\_p109-p117.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no66/F_p109-p117.pdf). In *R v Huntley*, the Soham murder trial, it wasn't until the end of the third week of the trial that the accused first volunteered his "preposterous" defence that the victims had been accidentally killed by him, see Editorial, "Accounting for Huntley," *The Guardian*, 18 December 2003. In a similar vein, the recent trial of two of the individuals responsible for the foiled July 2005 London terrorist bombing was delayed by nine months after they literally at the start of the original date fixed for trial came up with a completely new defence and, in the words of the trial judge, "attempted cynically to manipulate the process of this court," see Leveson, B Lord Justice, "Criminal Justice in the 21<sup>st</sup> Century", the Roscoe Lecture, St George's Hall, Liverpool, 29 November 2010, available at: <http://www.judiciary.gov.uk/NR/rdonlyres/BD53EA6F-EEF3-47F6-A4253BE8F912BCF5/0/speechbylevesonliroscoeleecture>.

<sup>135</sup> See, for example, Law Reform Commission (2000), above, n 129, at [2.12]-[2.18]. The Law Reform Commission research further suggested that "ambush" defences were far from unknown, see *Ibid*, at [3.64]-[3.65], and when used contributed to the outcome of the trial, see *Ibid*, at [3.69]-[3.70].

<sup>136</sup> See, for example, Bucke, T, Street, R, and Brown, D, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994 (Home Office Research Study No 199)* (London, Home Office, 2000) p 29-31 (noting that their survey had found 16% of suspects declined, either wholly or in part, to answer questions in interview and quoting other surveys that had found 22% and 23% of defendants did likewise). One Northern Irish survey even found over half of the suspects had refused to answer questions, see Dennis, I, "The *Criminal Justice and Public Order Act*: the Evidence Provisions" [1995] Crim LR 4 at 11. This trend is apparently more pronounced in respect of suspects facing more serious crimes, see Dixon, D, *Law in Policing: Legal Regulation and Police Practices* (Oxford, Clarendon Press, 1997) p 231 and 235.

<sup>137</sup> See Editorial, "Disclosing the Evidence" (1995) 159 JPN 277, Martin, Ch 4, n 19, 70 and Advisory Committee on Criminal Trials, *New Approaches to Criminal Justice: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice* (Toronto, Dept of Justice, 2006) at [62]. See further the discussion in Part 11 of Chapter 4 at [4.11.10].

<sup>138</sup> See, for example, *R v Cassell* (2000) 201 CLR 189 at 194-195 per Kirby J. Such a course of action accords with the "golden thread" of criminal law that the prosecution must prove each element of the alleged offence beyond reasonable doubt. The High Court has reaffirmed this reasoning in a series of decisions (see *R v Petty* (1991) 173 CLR 95, *R v RPS* (2000) 199 CLR 620, *R v Azzopardi* (2001) 205 CLR 50 and *R v Dyers* (2002) 210 CLR 285) emphasising that it is wrong to expect the defence to give or call evidence and the accused is entitled to insist the prosecution establish its case beyond reasonable doubt. See further the discussion in Part 10 of Chapter 10.

defence to be raised at trial, the detail may remain unknown until trial. Even common and straightforward defences can raise subtle and complex disclosure issues.<sup>139</sup> Then there are cases where every possible line of defence is pursued, even when there is a statutory requirement to notify the prosecution in advance of the intended defence.<sup>140</sup> As noted in 1995 by the editor of the *Justice of the Peace*:

The incident didn’t happen and even if it did happen my client wasn’t there. Even if my client was there he didn’t do it. Even if he did do it, he didn’t know that he was doing it. Even if you find against my client on those grounds, my client still has a number of defences to raise.<sup>141</sup>

[6.7.6] In such cases prosecutors will clearly have difficulty in assessing what is genuinely relevant to the accused. This brings to mind a famous cartoon in *Punch* referred to by Hammond J in the recent New Zealand case of *R v Haig*,<sup>142</sup> of a QC’s son found in a back yard with a cricket bat who was accused of breaking a nearby window with a cricket ball. There were no witnesses to the actual incident. The boy said, “The window is not broken. If it is, I did not break it. If I did, it was an accident.”<sup>143</sup> Such defences may well be, as noted by the editor of the *Justice of the Peace*, a “standing joke, but sometimes they are not all far from the truth.”<sup>144</sup>

[6.7.7] Quirk recites how one prosecutor remarked to her that, notwithstanding, difficulties in determining what may or may not be relevant to the defence, an experienced prosecutor might develop a “bit of a Sixth Sense” to assist him or her in this process.<sup>145</sup> Quirk is rightly dismissive of this as an acceptable means of resolving relevance. “Such a critical safeguard [as disclosure] should not be left to depend merely upon clairvoyancy.”<sup>146</sup>

[6.7.8] Even the contentious requirement under the CPIA requiring the accused to divulge his or her defence and the issues that he or she will challenge with the prosecution case has failed to resolve this problem.<sup>147</sup> Wells notes, with some understatement, that:

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<sup>139</sup> Wells, C, *Abuse of Process: A Practical Approach* (London, Legal Action Group, 2006) p 70.

<sup>140</sup> Such “blanket” denials are not uncommon in practice, even under the CPIA, see Goldsmith, Ch 5, n 219, 16. See also Aronson, Ch 4, n 19, 40 who described a defence statement that he saw as, “Frankly it is a two page joke, in which all issues are kept open, all allegations denied, and for good measure, mens rea is specifically denied.” See further the discussion below at [6.7.8]

<sup>141</sup> Editorial, above n 137, 277.

<sup>142</sup> [2006] 22 CRNZ 814.

<sup>143</sup> [2006] 22 CRNZ 814 at [123].

<sup>144</sup> Editorial, above n 137, 277.

<sup>145</sup> Quirk, Ch 5, n 242, 52.

<sup>146</sup> *Ibid*,

<sup>147</sup> The issue of defence disclosure is, as Moisisdis observes, “an area in which views are entrenched and passions run high” (see Moisisdis, Ch 1, n 33, 1) and it has been hotly debated for many years. Moisisdis argues that a regime of reciprocal prosecution and defence disclosure “would enhance the truth seeking process of the adversarial criminal trial”, see *Ibid*, 139 and Chapter 1, n 33. See further Law Reform Commission (2000), above n 132, at [3.85]-[3.125] for an overview of the arguments for and against defence disclosure. It is beyond the scope of this Thesis to enter into the debate about defence disclosure and to offer any conclusion on this issue.



"Defence statements have not been a success."<sup>148</sup> It is not uncommon to encounter defence statements (assuming that one is even served)<sup>149</sup> that either replicate the scenario described above by the editor of the *Justice of the Peace* or are no more than a bare and bland denial of guilt.<sup>150</sup> Plotnikoff and Woolfson found in their research in 1999 that an astounding 54% of the surveyed defence statements either consisted of a bare denial of guilt or otherwise failed to meet the requirements of the CPIA.<sup>151</sup> As was noted in 2000 by Bill Hughes, the Director General of the National Crime Squad, major problems are posed by defence statements that do not give specific details of the defence case and that are "regularly framed as bland statements, simply giving a not guilty plea and lead to a 'creeping disclosure' requirement during the course of the prosecution."<sup>152</sup> A typical example of such a defence statement is to be found in the 2005 case of *R v Bryant*.<sup>153</sup> It consisted of a general denial of the counts in the indictment that the accused faced accompanied with the unenlightening explanation, "The Defendant takes issue with any witness purporting to give evidence contrary to his denials."<sup>154</sup> The Court of Appeal considered that this did not meet the purpose of a defence statement and described it as "woefully inadequate" and "not worth the paper it is written on."<sup>155</sup> With such unenlightening defence statements it remains difficult for the prosecutor, even as a frank and objective minister of justice, to be able to assess meaningfully what may be relevant in the case and so fall for disclosure. Recent amendments have been enacted to the CPIA that are designed to tighten the requirements for meaningful disclosure of defence case.<sup>156</sup> Whether they will have their desired effect remains to be seen.<sup>157</sup>

[6.7.9] Scrutiny of the limited requirements that exist in Australia for the defence to notify the prosecution of the accused's intended defence<sup>158</sup> suggests that Australian

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<sup>148</sup> Wells (2006), above n 139, 57.

<sup>149</sup> The Attorney-General in 2005 claimed that the mandatory requirement to provide a defence statement in the Crown Court had come to be regarded as "voluntary" and noted that at one Crown Court the defence failed to serve a defence statement in an astonishing 85% of cases, see Goldsmith, Ch 5, n 219, 16.

<sup>150</sup> See Auld, Ch 2, n 333, Ch 10 at [158], Goldsmith, Ch 5 n 219, 16, Quirk, Ch 5, n 242, 56-57 and *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court* at [34].

<sup>151</sup> Plotnikoff and Woolfson, Ch 5, n 220, xi-xii and 136.

<sup>152</sup> Hughes, B, "The Search for the Truth" (2002) 152 NLJ 578.

<sup>153</sup> [2005] EWCA Crim 2079.

<sup>154</sup> [2005] EWCA Crim 2079 at [11]. In the vernacular, "It weren't me gov'," the defence equivalent of the well-known police phrase, "Fair cop Gov' you got me bang to rights."

<sup>155</sup> [2005] EWCA Crim 2079 at [12].

<sup>156</sup> The first amendments through s 33 of the *Criminal Justice Act* 2003 that came into operation on 4 April 2005 requires the accused to set out the nature of the defence in general terms, to indicate the matters upon which the accused takes issue with the prosecution case and to set out in relation to each such matter why issue is taken. The CPIA has now been even further tightened by s 60 of the *Criminal Justice and Immigration Act* 2006 that came into operation on 3 November 2008 and requires the defence to notify the prosecution of the particulars of any matters of fact on which the accused intends to rely on in his or her defence. There is an additional requirement for the defence to provide to the prosecution the names, addresses and dates of birth of any defence witnesses.

<sup>157</sup> See HMCPSI (2008), above n 5, 48 at [8.14] which found that in 2008 43% of defence statements still failed to meet the statutory criteria. See also Wells, above n 139, 59-60, Zander, M, "Mission Impossible" (2006) 156 NLJ 618 and Quirk, Ch 5, n 232, 42-59. See further the discussion in Part 12 of this Chapter.

<sup>158</sup> See the *Crimes (Criminal Trials) Act* 1993 and 1999 (Vic), Division 3 of the *Criminal Procedure Act* 1986 (NSW) (introduced 2001) and s.611b and s 611C of the *Criminal Code* (WA) (introduced 2002)

defence lawyers are as resistant as their English counterparts to divulging the nature of their case.<sup>159</sup> The defence disclosure requirements in Australia have not been widely used in practice and have been frustrated by the general culture of combat rather than co-operation of the lawyers involved.<sup>160</sup> The English and Australian experience of defence disclosure demonstrates the difficulties that remain for the prosecutor in predicting the defence case and assessing the significance of any item of unused material. Even a regime of mandated defence disclosure is not a “magic solution” to the prosecution’s problems.

## Part 8: Defence Involvement: Unavoidable Necessity?

[6.8.1] There is a strong argument for allowing the defence to have access to all the material garnered by the prosecutorial agencies in the course of their investigations, even where that material does not appear at first glance to be relevant to the defence case or might not be admissible at trial. That is because apparently irrelevant or inadmissible material may lead to lines of enquiry that are pertinent. It may well be helpful for the defence to have access to anything gathered or assembled by the prosecution in the course of their enquiries and for them and not the prosecution to judge its potential relevance and make such use of it as they deem fit. It does not follow that because an item is legally inadmissible it is not without value to the defence.<sup>161</sup> As Lord Mustill explained in *R v Preston*,<sup>162</sup> “Often the train of inquiry which leads to the discovery of evidence which is admissible at trial may include an item which is not admissible.”<sup>163</sup> In *Ward* the Court of Appeal observed that “non-disclosure is a potent source of injustice” and even with the benefit of hindsight it will often be difficult to say if an item not disclosed by the prosecution might have “shifted the balance or opened up a new line of defence.”<sup>164</sup> The Court of Appeal adopted the principle propounded by Lawton LJ in *R v Hennessey*<sup>165</sup> that all those who prepared and conducted prosecutions owe a duty to ensure that “all relevant evidence of help to an accused” was either led by them or made available to the defence.<sup>166</sup> The court explained:

We would emphasise that all ‘relevant evidence of help to the accused’ is not limited to evidence which will obviously advance the accused’s case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution

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<sup>159</sup> See Corns, Ch 4, n 19, 62-65, Mack and Anleu, Ch 4, n 19, 125 and Moisidis, Ch 1, n 33, 76. Rule 153 of the *Victorian Bar Inc Practice Rules Rules of Conduct and Compulsory Legal Education Rules* even makes it plain that defence counsel has no duty to divulge the nature of his or her client’s defence.

<sup>160</sup> Dawkins, K, “Defence Disclosure in Criminal Cases” [2001] NZ L Rev 35 at 48-49. See also NSW Law Reform Commission (2000), above n 132, at [3.31], n 17 and Corns, Ch 4, n 19, 38.

<sup>161</sup> The prosecution’s duty of disclosure extends to legally inadmissible material, see *R v Preston* [1993] 4 All ER 630 at 663 per Lord Mustill.

<sup>162</sup> [1993] 4 All ER 630.

<sup>163</sup> [1993] 4 All ER 630 at 663.

<sup>164</sup> [1993] 1 WLR 619 at 642.

<sup>165</sup> (1978) 68 Cr App R 419.

<sup>166</sup> (1978) Cr App R 419 at 426.

have gathered, and from which the prosecution have made their own selection of evidence to be led.<sup>167</sup>

[6.8.2] The Criminal Bar Association's submission to Justice Butterworth's Review of the London Bonded Warehouse prosecutions reflected this theme and supported the principle of allowing the defence automatic access to all non-sensitive material generated as a result of the investigation.<sup>168</sup> The Association submitted:

There is much to be said for the proposition that all the available material generated in an investigation forms a pool from which the Prosecution draws that which it relies on to form its case, and that where the pool contains other material (excluding that which should be protected from disclosure in the public interest) equality of arms favours allowing the Defence access to everything else in the pool.<sup>169</sup>

[6.8.3] The Crown Prosecution Service Inspectorate in 2008 noted that "where there is a large amount of [unused] material which is potentially relevant, expense will always be incurred because someone has to examine it if disclosure is to be done properly. The only question is where that responsibility and corresponding expense should rest."<sup>170</sup> There is a sizeable and respectable body of opinion that, in light of the major and still far from resolved issues of both practice and principle identified in this Chapter, ultimately the only fair and workable solution is to allow the defence access to everything in the prosecution's possession with the exception of material that is genuinely sensitive and/or may attract public interest immunity. This approach, however, has been strongly attacked in some quarters.<sup>171</sup> The Court of Appeal has asserted that handing the defence the "keys to the warehouse" (as this approach to disclosure is often known) "has been the cause of many gross abuses in the past, resulting in huge sums being run up by the defence without any proportionate benefit to the course of justice."<sup>172</sup> Though the suggestion of automatic disclosure was not embraced by Lord Justice Auld,<sup>173</sup> it received, as acknowledged by him, widespread support from contributors to his review into the English criminal process "as a pragmatic solution to the time-consuming task for the investigator and the prosecutor of determining disclosability on the known and expected issues in the case."<sup>174</sup>

[6.8.4] The suggestion was adopted and expanded by Justice Butterfield in his report into the ill-fated London Bonded Warehouse prosecutions. He suggested that although the prosecution should compile a list of the unused material in its possession, its duty of disclosure did not dictate that it alone should determine relevance. Rather Justice

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<sup>167</sup> [1993] 1 WLR 619 at 645. See also *R v Gillard & Preston* (1999) 76 SASR 76 at 93 per Bleby J, *Western Australia v Christie* (2005) 30 WAR 514 at 519 and *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568 at 598.

<sup>168</sup> McGuinness, above n 8, at [17].

<sup>169</sup> *Ibid.* See also Ormerod, above n 4, 108-113 and Burke, Ch 1, n 48, 511-519, who offer a similar argument.

<sup>170</sup> HMCPSI (2008), above n 5, 81 at [15.3].

<sup>171</sup> See Goldsmith, Ch 5, n 219, 14-15 and *Protocol for Control and Management of Heavy Fraud and Other Complex Criminal Cases* at [4(iii)].

<sup>172</sup> *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court* at [31].

<sup>173</sup> Auld, Ch 2, n 333, Ch 10 at [168]-[184].

<sup>174</sup> *Ibid.*, Ch 10 at [168].

Butterfield recommended that the defence should be provided with automatic disclosure of all non-sensitive material gathered by the prosecution in the course of its investigation.<sup>175</sup> He emphasized that this did not extend, as some might fear, to the prosecution routinely providing the defence with all the unused material, especially in a complex case.<sup>176</sup> Rather it meant that the defence should be entitled at some stage to inspect the non-sensitive unused material themselves to assess relevance and that they should be provided with copies of any item that they could justify receiving in terms of relevance.<sup>177</sup>

[6.8.5] Justice Butterfield provided the following rationale for automatic disclosure:

The defence know what may assist their case. The prosecution do not, save to the extent that they are informed by the defence statement [if there is one]. The onus of deciding what documents might assist should, in my view, be placed not on those who do not know the answer to that question – the prosecutor – but on those who do – the defence. How can the defence know what may assist their case without inspecting every piece of paper in the possession of the prosecution? If the schedule is reliable – and any system of disclosure, in particular the present regime, must proceed on that basis – they will be able to disregard most of the unused material. And they will certainly be better placed to identify what may assist them than the prosecutor: they know in detail what their case is, the areas in which unused material may assist them, the areas where there is no challenge to the prosecution case, the areas where their client is not involved.... the defence will know (or ought to know) what will be relevant and what will not be relevant. They will be able accordingly to identify with a reasonable degree of precision which documents set out in the unused material schedule require their attention. It is argued that the consequence of such a procedure would be to cause defence solicitors to spend months trawling through boxes of unused material. If the defence solicitors are justified in pursuing that course in the light of their instructions and the detail of the documents which will have already been provided to them on the schedule then it is entirely proper that they should be able to take that course.<sup>178</sup>

[6.8.6] It has been suggested that passing the responsibility for assessing the relevance of unused material to the defence would involve an abdication of prosecutorial responsibilities and simply “swamp” the defence as opposed to the prosecution. As Mitchell argues, “Without any filter to ensure that only relevant material is sent to the

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<sup>175</sup> Butterfield, Ch 5, n 159, 259 at [12.32]. Butterfield noted that despite the CPIA it was already routine for the SFO and many prosecutors, including Treasury Counsel at the Central Criminal Court, to provide the defence with any non-sensitive unused material or to at least allow them to inspect it, regardless of any assessment of relevance, see *Ibid*, at [12.35]. See also McGuinness, above n 6, at [9] (confirming that this “pragmatic” approach is often taken) and HMCPSI (2008), above n 5, 63 at [11.12] and 83 at [15.10]-[15.11] (confirming from a 2008 study that despite ever tighter legislation it was still common for prosecution counsel in complex or serious cases to provide “blanket disclosure” outside the CPIA). This approach has also been adopted in Australia in complex cases, see Martin, B, “Prosecution Issues,” Speech delivered at the AIJA Conference, “Perspectives on White Collar Crime: Towards 2000,” Melbourne, 27 October 1998, available at: <http://www.cdpp.gov.au/Director/Speeches/19980227bm.aspx>.

<sup>176</sup> *Ibid*, 267 at [12.37]. Whilst in a simple case where the unused material is likely to be limited it may be realistic for the prosecution to copy the unused material and provide it to the defence, that process may prove wasteful in a voluminous case such as those that Butterfield reviewed or those cited above at n 99 and n 101.

<sup>177</sup> Butterfield, Ch 5, n 159, 267 at [12.37].

<sup>178</sup> *Ibid*, 260-261 at [12.32]-[12.38].

defence, there is a danger of producing a veritable rainforest of paperwork to no avail.”<sup>179</sup> However, the prosecution is in a less favourable position than the defence to fairly and realistically assess what is significant to the defence. In light of the problems of both principle and practice, already discussed, it is preferable that the defence be left to assess what is or is not relevant to their case. The prosecution and defence may well take differing views as to what is likely to constitute relevant information or evidence in any given case.<sup>180</sup> The defence will be better placed than the prosecution to assess relevance and the value to their case of an item of unused material. As a “senior lawyer” quoted in an English survey put it: “In simple terms nobody can assess what undermines the prosecution case or supports the defence case, except the defence. Only they know what areas they intend to explore and the relevance of what may appear to the prosecution to be trivial or unimportant.”<sup>181</sup> It should not be for the prosecutor, no matter how well intentioned he or she might be and how faithfully they might adhere to the model of a minister of justice, to sift through what may well be a veritable mountain of material to identify what may be of relevance to the defence.

[6.8.7] There is also be an argument that the defence may lack the resources to inspect what could be vast amounts of unused material in the prosecution's possession for relevance.<sup>182</sup> If it was found that the defence routinely lacked the means to inspect the unused material for relevance, then the answer should lie in the appropriate authorities ensuring that the defence are sufficiently resourced and equipped to be able to carry out this task.<sup>183</sup> As even the Auld Review noted,<sup>184</sup> “In any event, full and timely prosecution disclosure is so fundamental to the fairness and efficiency of the criminal justice process, that if it costs more to do it properly, it is a price well worth paying.”<sup>185</sup> Smith LJ in *Gleadhill v Huddersfield Magistrates Court*<sup>186</sup> in 2005 described how the additional burden imposed by the modern duty of disclosure had not deterred the court's imposition of such a duty:

I do, however, accept one aspect of Mr. Elvidge's submissions. It is that, if the interests of justice require that resources are found for a particular purpose, then they must be found and the fact that this causes difficulty and expense must be borne with fortitude. It is not many years since the Court of Appeal Criminal Division declared that the duties of disclosure on the prosecution were much wider than had been the practice until that time. There was widespread dismay that disclosure would be too costly in terms of both

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<sup>179</sup> Mitchell, A, “Disclosure – whose Responsibility?” (1993) 137 SJ 854.

<sup>180</sup> Hawkins, Ch 5, n 156, 98.

<sup>181</sup> Emmerson, Ch 5, n 216.

<sup>182</sup> Plontikoff and Woolfson in 2000 estimated the cost of the prosecution or the defence inspecting each item of unused material at 30 million pounds, see Plontikoff and Woolfson, Ch 5, n 220, 12 and 23.

<sup>183</sup> It is possible that given the expense, duplication and bureaucracy of the present statutory scheme (see Butterfield, Ch 5, n 159, 261 at [12.37] and Plontikoff and Woolfson, Ch 5, n 220, 115) it would actually cost no more in practice for the defence to undertake this task than it already costs for the police and prosecution lawyers to do so.

<sup>184</sup> Though in a different context. Auld supported prosecutors, as opposed to police officers, assuming the prime responsibility for determining relevance of unused material, see Auld, Ch 2, n 333, Ch 10 at [179]-[180].

<sup>185</sup> *Ibid*, Ch 10 at [179].

<sup>186</sup> [2005] EWHC Admin 2283.

money and police time. However, this expense had to be borne in the interests of justice. For a while after that, disclosure gave rise to very real resource problems because the ground rules were not clear. The CPIA 1996 was enacted in order to place reasonable limits on disclosure and to provide ground rules. No doubt there are continuing resource implications but everyone now accepts that these must be borne.<sup>187</sup>

[6.8.8] It is my argument that ultimately the solution of allowing the defence to inspect any unused material in the prosecution’s possession represents the best (or perhaps it might be more aptly expressed as the least worse solution) solution to this issue. Whilst the prosecution should still act as the candid minister of justice in relation to disclosure, this should not translate to a responsibility for assessing what should be disclosed and withheld. The approach that is likely to avoid the pitfalls discussed above and to achieve maximum disclosure for the benefit of the defence is to notify the defence of all the items in the possession of the prosecution and, if it is impracticable to copy and provide them to the defence (as will often be the case), to permit the defence to have access to them (with the exception of material properly covered by public interest immunity) in order to assess their relevance.

### **Part 9: Undermining the “War on Crime” and Creating a Charter for Abuse by Defence Lawyers or Defence Lawyers doing their Duty?**

[6.9.1] One of the traditional objections to disclosure has been that it would “undermine” the war on crime and lead to intimidation and the “nobbling” of witnesses. Samuels in 1965 made the following pessimistic prediction as to the consequences of imposing a wide duty of disclosure upon the prosecution.

The work of the police in the war against crime must not be hampered. The prosecution might be greatly burdened if copies of every statement taken in connection with an offence had to be supplied. The police cannot be expected to disclose everything to the ‘underworld’. Statements might relate to other offences concerning third parties. People might be reluctant to make statements to the police if they knew that there would be no confidence observed and that the statements would be given to the defence. People who had originally made statements which were untrue might on entering the witness box be reluctant to change them to the truth for fear of having to meet a damaging cross-examination from the defence. The policeman might not bother to record a statement if he thought that it would not assist the prosecution, though this would seem to be a rather imaginary fear.<sup>188</sup>

[6.9.2] This raises the question whether these fears have been realized since the development of the modern duty of disclosure in England in the early 1990s. Some of

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<sup>187</sup> [2005] EWHC Admin 2283 at [31].

<sup>188</sup> Samuels, A, “Prosecution Evidence for the Defence” (1965) NLJ 193. Samuels rejected the automatic disclosure of everything in the prosecution’s possession as that “would involve a fundamental departure from our practice in criminal cases” (*Ibid*). Samuels, consistently with the informal “Old Boys Act” approach of the time, suggested that any statements should be provided to the prosecution lawyer who should determine in accordance with his or her professional ethics what should be reasonably required to be divulged to the defence, see Part 4 of Chapter 5.

Samuels' fears have proved illusory or misguided.<sup>189</sup> There is no evidence from any case law, commentary or research that following *Ward* and *Keane* or the CPIA that untruthful witnesses have felt compelled to adhere to their initial false accounts to avoid being impugned in cross-examination. Nevertheless, some of the concerns raised by Samuels are pertinent. Specifically, the experience of disclosure in England suggests that the prosecution's duty of disclosure has provided a charter for defence lawyers to "play the system" and abuse their new found entitlements to frank disclosure, though there is a difference of opinion in this regard. On the one hand there is a body of opinion that the defence have consistently misused their new found rights in respect of disclosure. On the other hand there is the view that the defence are entitled and, indeed, positively expected in an adversarial criminal process to take any legitimate point that might further the cause of their client.

[6.9.3] The body of opinion that holds that the experience of disclosure in England since *Saunders* and *Ward* has been one of calculated and systematic abuse by defence lawyers asserts that since the early 1990s it has become commonplace for defence lawyers to use their entitlement to knowledge of the prosecution case "to manipulate the system to their advantage by requesting disclosure to delay trials, obfuscate issues and prejudice and embarrass the prosecutors."<sup>190</sup> Michael Howard, the then Home Secretary, in 1996 declared that "it is professional criminals, hardened criminals and terrorists who disproportionately take advantage of, and abuse the present system [of disclosure]."<sup>191</sup> In a robust speech in 2005 Lord Goldsmith, the Attorney-General, declared that it was clear that the English disclosure system was not working as intended. Rather "it has been misapplied, misused and in some cases abused [by the defence]. It leads to huge sums of money being spent on fishing expeditions where the defence are searching for some "get out of jail free card".<sup>192</sup> Goldsmith expressed the fear that unless the misuse of disclosure tactics in serious crimes was checked, it could lead to a two tier criminal justice system, with defendants from "sink estates" brought to justice but "white collar" criminals able to evade prosecution.<sup>193</sup>

[6.9.4] It is an "undoubted fact that defence lawyers sometimes bombard the prosecution with requests for thousands of documents with little regard to their relevance"<sup>194</sup> It is often asserted that both the common law and statutory duties of disclosure have allowed defendants to indulge in "fishing expeditions" and raise dubious, if not contrived, defences.<sup>195</sup> It is clear that defendants and/or defence lawyers,<sup>196</sup> as asserted by Lord

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<sup>189</sup> Though the many wrongful convictions attributable to prosecution non-disclosure (see above at [6.4.1.3]) and the widespread non-compliance with the CPIA (see above at [6.4.1.4]) suggest that the "imaginary fear" noted by Samuels that an investigator might choose not to record an unhelpful piece of information may be very real.

<sup>190</sup> Wells, above n 139, 52.

<sup>191</sup> Quoted by Fitzpatrick, B, "Disclosure: Principles, Process and Politics" in Walker, C, and Starmer, K, *Miscarriages of Justice: a Review of Justice in Error* (Oxford, Oxford University Press, 1999) p 158.

<sup>192</sup> Goldsmith, Ch 5, n 219, 3-4.

<sup>193</sup> *Ibid*, 4.

<sup>194</sup> *R v Winston Brown* [1994] 1 WLR 1599 at 1609.

<sup>195</sup> See, for example, *Disclosure: a Protocol for the Control and Management of Unused Material at the Crown Court* at [1] ("Disclosure....is one of the most abused of the procedures relating to criminal trials"), Goldsmith,

Templeman in *Wiley*, since the expansion to the prosecution’s duty of disclosure have shown on occasion an uncanny ability to pursue a defence that raises issues such as public interest immunity. Lord Taylor CJ in 1994 in *R v Turner*<sup>197</sup> noted that since *Ward* there had been an increased tendency for defendants to seek disclosure of the names and roles of police informants on the basis that such details were essential for their defence.<sup>198</sup> Assertions of duress or that the accused had been “set up,” previously rare, had multiplied.<sup>199</sup> The Lord Chief Justice highlighted the need for vigilance and robustness by trial judges in dealing with defence claims that disclosure of a sensitive item might be necessary for an accused person’s defence.<sup>200</sup> Despite such caution there have been cases where the prosecution has been compelled to abandon its case as a result of the insistence of the courts that sensitive unused material be disclosed.<sup>201</sup>

[6.9.5] It has been further suggested that the disclosure obligations have contributed to the plethora of often spurious claims that prosecutions should be stayed as an “abuse of process.”<sup>202</sup> Issues of disclosure have proved a fertile source for defence assertions of abuse of process. Justice Butterfield in 2003 remarked of the “burgeoning industry in this form of satellite litigation.”<sup>203</sup> Lord Woolf CJ in *R v Childs*<sup>204</sup> spoke in strong terms of the routine practice “up and down the country” for defence counsel to raise arguments of abuse of process.<sup>205</sup> The Lord Chief Justice considered that such arguments wasted much court time, distorted the already complicated trial process and that it “is irresponsible [for defence counsel] to add to that complexity by putting forward unnecessary allegations dressed up as abuse of

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Ch 5, n 219, 1-30, Home Office, *Disclosure: a Consultation Document* (London, HMSO, 1995) and Epp, Ch 5, n 119,70 and 78-80. The justification for these assertions is disputed, see *Ibid*,

<sup>196</sup> It is unlikely that the version of an accused is always his or her own unvarnished account and does not bear some hallmarks of “suggestion,” if not outright manufacture, by his or her lawyers, see Watson, A, “Witness Preparation in the United States and England and Wales” (2000) 164 JPN 816 at 822.

<sup>197</sup> [1995] 3 All ER 432.

<sup>198</sup> [1995] 3 All ER 432 at 435.

<sup>199</sup> [1995] 3 All ER 432 at 435. See, for example, *R v Stone* [2000] EWCA Crim 48. The defence tried to subpoena the police informer to give evidence as a defence witness. This exercise was viewed with suspicion by the court. There was a “high degree of artificiality” in the action and it appeared to be a thinly disguised attempt to pressurise the prosecution into dropping the case [2000] EWCA Crim 48 at [35].

<sup>200</sup> *R v Turner* [1995] 3 All ER 432 at 435-436. See also *R v Stone* [2000] EWCA Crim 48 at [28].

<sup>201</sup> See *R v Langford* [1990] Crim LR 653; *R v Agar* [1990] 2 All ER 442; *R v Vaillencourt*, *The Times*, 12 June 1992; *R v Reilly* [1993] Crim LR 279; *R v Yirtici*, unreported, Court of Appeal, 12 July 1996 No 95/4882/Y2, Transcript Smith Bernal and *R v Baker* [1996] Crim LR 55 (orders made, or should have been made, by the trial judge that details of police informants be released in order to assist a tenable line of defence). In such cases the prosecution may choose to protect its confidential information than seek to secure the conviction of the accused.

<sup>202</sup> For a discussion of the basis and scope of this principle see Corker and Young, Ch 5, n 209 and Choo, A, “Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited” [1995] Crim LR 864. See further the discussion in Part 5 of Chapter 10.

<sup>203</sup> Butterfield, Ch 5, n 159, 283 at [12.83].

<sup>204</sup> *The Times*, 30 November 2002.

<sup>205</sup> *The Times*, 30 November 2002.



process.”<sup>206</sup> Defence counsel should not, at the risk of a wasted costs order, advance arguments asserting abuse of process unless they are warranted.

[6.9.6] However, this and other similar exhortations<sup>207</sup> appear in England to have fallen on deaf ears. Claims of abuse of process have continued to proliferate. As Corker and Young noted in 2003, “Trial courts have largely been about as successful as King Canute in holding back the tide of applications.”<sup>208</sup> This theme was echoed by Justice Butterfield who noted, “Prosecutors maintain that they face a large number of hopeless, unfounded and apparently inconsistent abuse of process arguments. Paraphrasing Samuel Johnson, one spoke to me of such applications as ‘the last refuge of the scoundrel’.”<sup>209</sup>

[6.9.7] And not only is there the prevalence of such claims. Such claims, far from being destined to fail, have proved surprisingly successful in practice.<sup>210</sup> Justice Butterfield observed, “Despite clear judicial authority that the imposition of a stay should be an exceptional remedy seldom justified on the facts, the reality is that applications are successful on more occasions than might be expected.”<sup>211</sup> Indeed, more than one successful claim of an abuse of process due to prosecution non-disclosure has been discovered on further scrutiny to be groundless.<sup>212</sup>

[6.9.8] Nevertheless, as the editor of *Justice of the Peace* in 1995 noted, whilst there have been occasions when the defence have abused their rights in respect of disclosure, one should not forget the proper role of any defence lawyer:

There are undoubtedly instances where these criticisms are justified. It has to be remembered, however, that a defence solicitor is under a duty to investigate the case fully on behalf of his client and to neglect no avenue of defence which may be open to him. If he were to take a different attitude, he could well be failing in his duty to the client.<sup>213</sup>

[6.9.9] There is substance to this view. After all, if the “silver thread” of the criminal law is that the prosecutor must act as a minister of justice,<sup>214</sup> then the “golden thread” remains

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<sup>206</sup> *The Times*, 30 November 2002.

<sup>207</sup> See, for example, *Environment Agency v Stanford*, unreported, Divisional Court, 30 June 1998, No Co/4625/97 and *R v Howell* [2003] EWCA Crim 486.

<sup>208</sup> Corker and Young, Ch 5, n 209, 268.

<sup>209</sup> Butterfield, Ch 5, n 159, 273 at [12.83].

<sup>210</sup> See Plotnikoff and Woolfson, Ch 5, n 220, 101-104.

<sup>211</sup> Butterfield, Ch 5, n 159, 269-270 at [12.71]. See further the discussion in Part 5 of Chapter 10.

<sup>212</sup> *R v Doran*, unreported, Bristol Crown Court, 6 July 1999, is a leading example of this. The judge at first instance, Turner J, stayed a retrial in a large scale drugs importation case as a purported “abuse of process” owing to the serious alleged failures of the prosecution with respect to disclosure but it is clear that there was no basis for this order, see Butterfield, Ch 5, n 159, Appendix 4, 300-303 and *R v Togher & Ors* [2000] EWCA Crim 111 at [63]-[65]. See also Goldsmith, Ch 5, n 219, 6, who cites a similar case where the trial judge stayed as an abuse of process the prosecution of an alleged drug dealer when the prosecution had failed within the time scale set by the judge to provide edited copies of a large amount of video surveillance even though it bore no relevance to the issues at trial.

<sup>213</sup> Editorial, above n 137, 277.

<sup>214</sup> *R v Pearson* (1957) 21 WWR (NS) 337 at 348.

that of the duty of the prosecution to establish the guilt of the accused beyond reasonable doubt.<sup>215</sup> This fundamental proposition is sometimes overlooked in the debate regarding disclosure. If there is a legitimate point or proper line of enquiry to explore, then it is only right that the defence should pursue that avenue. The many wrongful convictions in England, both historical and modern, resulting from non-disclosure bears eloquent testimony to the need for diligence on the part of defence lawyers in preparing their client’s defence. According to Redmayne an inevitable consequence of the fact that the defence is best positioned to judge what is relevant to its case, is that defendants to whom disclosure is made will find weaknesses in the prosecution case.<sup>216</sup> Accordingly, it is right and possible that the defence should pursue the fullest degree of disclosure possible. A defence lawyer should not be criticized for taking advantage of a system that has been put in place for the benefit of the accused. As Roberts argues:

Investigation of the prosecution’s case and possible defences has long been recognised as a core function of defence counsel in a criminal case, one that is necessary to the testing of facts in our adversarial system...adversarial testing cannot take place without defence counsel’s independent investigation of the facts. The right to effective assistance of counsel rings hollow when restrictive discovery rules render an attorney unable to investigate the facts of the case.<sup>217</sup>

[6.9.10] This is a compelling argument. Whilst there is support for the assertion that some defence lawyers have “obstructed justice” by a vexatious approach to disclosure, it remains the obligation of any defence lawyer to test the prosecution case by seeking and considering any material that is relevant. Moreover, defence lawyers can only offer realistic and accurate advice to their clients about the strength of the prosecution case and their clients’ prospects of conviction once they have considered all the relevant material in the prosecution case. A defence lawyer, providing he or she does not stray outside his or her paramount duty to assist in the administration of justice as an officer of the court,<sup>218</sup> should not be criticised for pursuing and scrutinising prosecution material.

## **Part 10: Disclosure of Third Party Material: Minister of Justice or Private Detective for the Defence?**

[6.10.1] An area of disclosure that “rears its head time and time again”<sup>219</sup> in practice is the disclosure of material held by a third party such as a doctor, counsellor, school or social or community services department. The role of the prosecutor with respect to material held by a third party to the proceedings has proved problematic. Rook and Ward highlight the “widespread confusion and dissent amongst practitioners”<sup>220</sup> as to which party has the responsibility of seeking such third party material. At first glance this confusion might seem surprising. The traditional rule in civil litigation is that discovery

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<sup>215</sup> *Woolmington v DPP* [1935] AC 462 at 481.

<sup>216</sup> Redmayne, above n 4, 444.

<sup>217</sup> Roberts, J, “Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pre Trial Discovery in Criminal Cases” (2004) 31 Ford Urb LJ 1097 at 1109-1100.

<sup>218</sup> See the discussion in Chapter 2, n 74.

<sup>219</sup> Rook, P, and Ward, R, *Sexual Offences: Law and Practice* (3<sup>rd</sup> ed) (London, Sweet & Maxwell, 2004) p 603.

<sup>220</sup> *Ibid*, 620.

does not lie against a third party to the proceedings<sup>221</sup> and a mere witness cannot be treated as a party in order to obtain discovery from him or her.<sup>222</sup> Items in the possession of a witness are not deemed to be in the possession of a party, even if that witness is to be called at any trial by a party to the proceedings.<sup>223</sup> This proposition equally applies in the context of criminal proceedings. As both Corker and Niblett note, a prosecution witness is deemed to be a third party to the proceedings and is not to be treated as part of the prosecution for the purposes of disclosure simply because he or she is a witness for the prosecution.<sup>224</sup> Material in the possession of such a witness is not disclosable unless it should also happen be in the prosecution's possession. Even if the prosecution might have obtained such material from a potential prosecution witness or other third party through use of statutory powers and/or informal arrangements, such material remains in the possession of the third party and there is no duty upon the prosecution to exercise its powers or goodwill to obtain that third party material so that it is made available to the defence.<sup>225</sup> This proposition is unaffected by the position of the prosecutor as a non-combatant minister of justice within the criminal process. As Millet J in 1991 in *Re Barlow Clowes Gilt Managers Ltd*<sup>226</sup> noted:

..all this has nothing to do with the third party who is not himself involved except possibly as a witness. He is under no obligation to provide voluntary assistance whether to the prosecution or the defence. He is not bound to disclose his private documents except to the extent that statute has laid such an obligation upon him.<sup>227</sup>

[6.10.2] This proposition might be criticized. There is likely to be an imbalance between the respective positions of the prosecution and defence.<sup>228</sup> The prosecution is likely to occupy a privileged position and enjoy resources, powers and facilities that will be lacking to the defence.<sup>229</sup> In contrast to the defence, as Ede and Shepherd comment, "there is the battle to obtain criminal legal aid to resource a comprehensive analysis of the case, let alone investigation by a solicitor."<sup>230</sup> Typically defence cases are founded on searching for manifest weaknesses in the prosecution case, rather than on defence

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<sup>221</sup> *Elder v Carter, ex parte Slide & Spur Gold Mining Discovery Co* (1890) 25 QBD 194 at 198.

<sup>222</sup> *Elder v Carter, ex parte Slide & Spur Gold Mining Discovery Co* (1890) 25 QBD 194 at 198.

<sup>223</sup> See *MacMillan Inc v Bishopsgate Investment Trust* [1993] 4 All ER 998 at 1002 and 1007.

<sup>224</sup> Corker, Ch 5, n 43, 138, n 16 and Niblett, Ch 5 n 43, 92. cf *R v Skingley & Burdett*, unreported, Court of Appeal, 17 December 1999, No 9903677 Z2/9904709/9903679, Transcript: Smith Bernal Report Ltd, where in a complex fraud case when the defrauded bank had effectively initiated the criminal proceedings, the Court of Appeal suggested that there was a heavy burden on the bank, as the ultimate prosecutor, to make available to the prosecution for provision to the defence any documentation relevant to the issues in the case, even if privileged or commercially sensitive. Any failure by the bank to do so might compromise "the integrity of the proceedings," Transcript at [74]. See also *R v Alibhai & Ors* [2004] EWCA Crim 681 at [107].

<sup>225</sup> See *Re Barlow Clowes Gilt Managers Ltd* [1991] 4 All ER 385 at 392-94; *Morris v Director of SFO* [1993] Ch 372 and *R v Maxwell*, unreported, Court of Appeal, 9 February 1995, Transcript: John Larking.

<sup>226</sup> [1991] 4 All ER 385.

<sup>227</sup> [1991] 4 All ER 385 at 393.

<sup>228</sup> See Fitzpatrick, above n 191, 151-152.

<sup>229</sup> *Ibid.* See also Zacharias, Ch 4, n 9, 74-79 and Part 9 of Chapter 5 at [5.9.2].

<sup>230</sup> Ede, R, and Shepherd, E, *Active Defence: A Solicitor's Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases (1<sup>st</sup> ed)* (London, The Law Society, 1997) p 3.

lawyers’ investigations conducted in preparation of their clients’ case.<sup>231</sup> The prosecution is able to pursue enquiries of witnesses and/or third parties in respect of significant material that would not be open to the defence. In the present climate of tight public expenditure, especially in relation to legally aided defendants,<sup>232</sup> it is arguable that it is unrealistic to expect defence practitioners to be able to pursue the same enquiries as are open to the prosecution. The defence lawyer is likely to be operating on a “shoestring” and may well lack the ability to make enquiries of third parties and to seek potentially relevant material in their possession. One English solicitor in an early 1990s study commented in the following terms:

Investigation would be very difficult in a legal aid environment where basically you have got to keep going and churn out as many cases as possible to survive. I think that there is a big difference between the prosecution, who have got the police investigating these crimes and can spend a lot of time, money and effort doing so and what we can do from this side.<sup>233</sup>

[6.10.3] Corker comments to similar effect:

The defence is likely to be funded by legal aid. The quality of the preparation of the defence case may be affected by a paucity of resources and by a resultant disinclination amongst state funded lawyers to perform more than a routine and symbolic process management exercise in respect of the client.<sup>234</sup>

[6.10.4] This view is fortified when one considers the implications of the prosecutor’s role as the detached minister of justice whose only concern is to aid the administration of justice. Though the prosecution may not be under any strict duty to obtain relevant third party material with a view to potentially disclosing it to the defence, <sup>235</sup> there is an argument that the prosecutor’s role as a minister of justice means that he or she cannot

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<sup>231</sup> *Ibid.*

<sup>232</sup> The administration of criminal justice has proved not immune over recent years from the principles of managerial efficiency and a desire to achieve “value for money,” see Mackie *et al*, Ch 4, n 250, 460. These financial pressures have especially extended to the state financing of legal representation for eligible defendants in both England (see, for example, Rohan, P, “Legal aid close to crisis, survey warns” (2003) 100 Law Soc Gaz 1 and 3; Kirk, D, “Toughness and the Cost of Legal Aid” (2006) 70 Jour Crim Law 363 and McVeigh, T, “Low-Paid Suffer from Legal Aid Cuts,” *The Observer*, 1 February 2009) and Australia (see, for example, Kirby, M, “The Crisis in the Law,” Speech delivered at the Law Society of New South Wales Annual Dinner, Sydney, 31 October 1996, available at: [http://www.hcourt.gov.au/speeches/kirby/kirby\\_probono.htm](http://www.hcourt.gov.au/speeches/kirby/kirby_probono.htm) (highlighting the “crisis” in Australian legal aid and noting the per capita funding in Australia of \$13 per person against \$65 per person in the United Kingdom) and Regan, F, “Rolls Royce or Rundown 1970s Kingswood? Australia’s Legal Aid in Comparative Perspective” (1997) 22 Alt Law Jour 225-228).

<sup>233</sup> McConville *et al*, Ch 1, n 158, 68. See also Baldwin, J, and McConville, M, *Negotiated Justice* (London, Martin Robertson, 1977). Given the acute pressures on legal aid funding over recent years (see above n 232) it is unlikely that this situation would have improved since these studies.

<sup>234</sup> Corker, Ch 5, n 43, 67. See *R v Fergus* [1994] 1 Cr App R 313 for such a case where the total lack of preparation for trial by the defence lawyers contributed to the wrongful conviction of their “wholly innocent” client.

<sup>235</sup> See *R v Alibhai & Ors* [2004] EWCA Crim 681 at [63]. Though in England this is subject to [3.4] of the CPIA *Code of Practice* that requires the investigator to pursue all “reasonable lines of enquiry, whether these point towards or away from the suspect.” This suggests that the prosecution must investigate fairly all case theories, not just those pointing to the guilt of the accused, see further Corker and Young, Ch 5, n 209, 95-97. This is supported by [51]-[54] of the *Attorney-General’s Guidelines on Disclosure* 2005 that encourages the prosecution to take “reasonable” measures to acquire unused material held by a third party that is likely to be significant.

simply refuse as a matter of course to embark upon such a task.<sup>236</sup> He or she may be called upon to assist.<sup>237</sup> As Corker observes:

It should, however, be emphasized that while the prosecutor may not be obliged to assist the defence in its enquiries and may not use its statutory enquiries in order to do so, there is no legal impediment to the prosecution doing what it can to assist the defence in the interests of justice.<sup>238</sup>

[6.10.5] It cannot be assumed that third party material is unlikely to be of any real significance and that defence efforts to obtain such material are likely to be misconceived. In a number of cases third party material has proved significant to the outcome of a case.<sup>239</sup> Indeed, there are a variety of situations in which material held by a third party is likely to be "crucial"<sup>240</sup> or "essential."<sup>241</sup> In *R v M*,<sup>242</sup> for example, the accused was charged with assaulting a child. Material held by a third party, namely the local authority, was regarded by the Court of Appeal as cogent and undermining the complainant's assertion that she had been physically abused by the accused.<sup>243</sup> It is clear that there will be cases similar to *M* which have either been abandoned by the prosecution after the revelation of third party material that undermines its case (and even suggested the innocence of the accused) or such material has contributed to an acquittal.<sup>244</sup>

[6.10.6] There is a tenable argument that the prosecutor's role as a minister of justice extends to obtaining potentially relevant material from a third party. In *R v M*<sup>245</sup> the Court of Appeal suggested that the prosecution had been in error in not seeking the third party material that undermined the victim's credibility.<sup>246</sup> In *R v MacNeil*<sup>247</sup> the Supreme Court of Canada held that the prosecutor's role as a minister of justice meant that it could not sit

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<sup>236</sup> See further *R v MacNeil* [2009] 1 SCR 66 at [49].

<sup>237</sup> See, for example, Rook and Ward, above n 219, 620-621.

<sup>238</sup> Corker, Ch 5, n 43, 60 at [4.35].

<sup>239</sup> See, for example, *R v Clark* (1993) 171 LSJS 133 and *R v K* [2002] EWCA Crim 2878.

<sup>240</sup> Rook and Ward, above n 219, 603.

<sup>241</sup> Glynn, J, "Disclosure" [1993] Crim LR 841 at 848. Glynn describes the importance of social service records in alleged child sexual abuse cases. See also Birch, D, and Taylor, C, "'People Like Us': Responding to Allegations of Past Abuse in Care" [2003] Crim LR 823 at 827.

<sup>242</sup> Unreported, Court of Appeal, 5 November 1999, No 9803990/Y4, Transcript: Smith Bernal.

<sup>243</sup> The material held by the local authority undermined the assertion of the young complainant that she had been physically abused by the accused.

<sup>244</sup> Niblett gives the example of a rape case at the Central Criminal Court that was abandoned by the prosecution after third party medical notes undermined the victim's credibility (the notes revealed previous allegations of rapes, sometimes in bizarre circumstances), see Niblett, Ch 5, n 43, 166-167. I can recall similar cases from personal experience in both England and Australia where third party material led to the discontinuance of the prosecution. The third party material typically fatally undermined the credibility of the complainant.

<sup>245</sup> Unreported, Court of Appeal, 5 November 1999, No 9803990/Y4, Transcript: Smith Bernal.

<sup>246</sup> Transcript, 5. See also *R v McCann*, unreported, Court of Appeal, 28 November 2000, Transcript: Smith Bernal, at [59]. *M* and *McCann* highlight the dilemma confronting defence lawyers in seeking to obtain third party material in that they are damned if they do and at risk of a wasted costs order and damned if they don't, see Richardson, P, "Comment," 27 Crim L Weekly, July 17 2000. Richardson argues that the "best solution" is for the prosecution to "routinely" obtain such items and then for the normal rules of disclosure to apply, see *Ibid*.

<sup>247</sup> [2009] 1 SCR 66.

passively by if it became aware that a third party held relevant material. Rather the prosecutor’s role of “undivided loyalty to the proper administration of justice” required it to inquire further and to obtain such material if “reasonably feasible.”<sup>248</sup>

[6.10.7] Nevertheless, this can present difficulties and raises issues of the proper regard to be paid to the interests of victims and witnesses. There are strict rules governing access to information held by a third party and the relevant decisions in England are adamant that any approach cannot be employed as a disguised form of discovery intended to find information that might be solely of use in cross examination on issues of credibility.<sup>249</sup> The information must be both legally admissible and “material” in a very real sense to the likely issues in the case.<sup>250</sup> Indeed, there is further authority that the information to be sought or evidence to be adduced should be material to the proceedings in that it tends to support the case of the party seeking that information or the evidence of that witness.<sup>251</sup> This narrow approach contrasts with the broader *Keane* (now the CPIA) test for disclosure applicable to information held by the prosecution. It is clear that there is a real tension between the third party and the *Keane* or CPIA tests of relevance.<sup>252</sup> The issue of third party disclosure is often most apparent with regards to highly sensitive records held by third parties such as social services, medical practitioners, counsellors and schools that relate to victims of sexual or violent offences. There is evidence that the defence is particularly likely to seek access to third party material in sexual assault cases where, more than in trials for any other offence, “the main strategy employed by defence barristers... is to seek to undermine the personality of the complainant, to attack and preferably destroy her credibility.”<sup>253</sup> In *R v H*<sup>254</sup> Sedley J referred with disapproval to this trend and noted that it had “become standard practice” for the defence to seek such material.<sup>255</sup> Many commentators have also expressed their disquiet at the trend for the defence to seek confidential and private records held by third parties such as doctors, counsellors, psychologists and psychiatrists in order to find useful material to put in cross-examination.<sup>256</sup> It is apparent that defence

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<sup>248</sup> [2009] 1 SCR 66 at [49].

<sup>249</sup> See *R v Reading Justices, ex parte Berkshire County Council* [1996] 1 Cr App R 239; *R v M (Wasted Costs Order)* [1996] 1 FLR 750; *Re: a Solicitor (Wasted Costs Order No 1 of 1994)* [1996] 1 FLR 40; *R v Azmy* (1996) 7 Med LR 415; *R v Counsel (Wasted Costs Order No 5 of 1997)*, *The Times*, 7 September 1999 and *Douglas Narayan & Partners v Khan* (1998) PNLR 535.

<sup>250</sup> See the cases cited above at n 249.

<sup>251</sup> See *R v Marylebone Magistrates Court, ex parte Gatting & Emburey* (1990) 154 JP 549.

<sup>252</sup> See *R v Brushett* [2001] Crim LR 471 where the Court of Appeal sought to reconcile the two tests. The court suggested that in cases of sexual abuse of children it was proper for the prosecution, as counsel had done, to disclose any prior reports that the child had been sexually abused and any false report that the child had made in the past.

<sup>253</sup> See, for example, Temkin, J, “Digging the Dirt: Disclosure of Records in Sexual Assault Cases” (2002) 61 *Cam L Jour* 126. See further Temkin, J, “Prosecuting and Defending Rape: Perspectives from the Bar” (2000) 27 *Jour of Law and Society* 219 at 231-236.

<sup>254</sup> [1997] 1 Cr App R 176.

<sup>255</sup> [1997] 1 Cr App R 176. See also *R v Azmy* (1996) 7 Med LR 415 and *R v Higgins* [1996] 1 FLR 137.

<sup>256</sup> See Busby, K, “Discriminatory Uses of Personal Records in Sexual Assault Trials (1997) 9 *CJWL* 148; Cossins, A, “Tipping the Scales in her Favour: The Need to Protect Counselling Records in Sexual Assault Trials”

lawyers may seek, and even expect, the prosecution to carry out their own enquiries into third party material.<sup>257</sup> Disquiet about these practices has led to the enactment of legislation in most Australian jurisdictions that either restricts<sup>258</sup> or precludes<sup>259</sup> defence access to such material.

[6.10.8] The idea of the prosecutor acting at the behest of the defence in seeking material held by a third party that might undermine its case is curious. There must be very real questions about the ethical position of a prosecutor seeking material of a potentially highly sensitive nature about the victim or other prosecution witnesses for use by the defence. It appears to involve the prosecution doing "the dirty work" for the defence by obtaining material, often of a highly confidential or sensitive nature, which will either undermine the prosecution case or be used to attack the testimony or credibility of the victim or another prosecution witness. Such far reaching disclosure arguably infringes the legitimate interests and rights of victims and witnesses.<sup>260</sup> It may well discourage them from seeking counseling support or reporting offences. In this regard it would also appear to run counter to the public interest as well as the now recognized need for the prosecutor to be responsive to the welfare of victims and witnesses.

[6.10.9] Further, a requirement that the prosecution obtain such information to the discredit of its case or its witnesses is in opposition to the rationale and operation of an adversarial system of criminal justice. While the interests of justice require that the police conduct a diligent and objective investigation not clouded by "tunnel vision,"<sup>261</sup> those interests are not advanced by requiring the prosecution to adopt the role of "private detective" at the behest of the defence and pursue sensitive or confidential third party material that will be used to attack the credibility of its own witnesses. There must be limits to the role of the prosecutor, even as a minister of justice, with respect to disclosure. One logical limit is where information is held by a third party. It is acknowledged that there may be unusual circumstances in which it may be prudent or

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in Eastal, P, *Balancing the Scales: Rape Law Reform and Australian Culture* (Sydney, Federation Press, 1998) p 94; Dawson, J, "Production of Therapeutic Records to the Defence" (1998) 5 PPL 63 and McCrimmon, M, "Trial by Ordeal" (1996) 1 Can Crim L Rev 31.

<sup>257</sup> See Richardson, J, "You can't see anything, but you can say what you like," Lecture delivered to the North Eastern Circuit, 6 October 2007, [28]-[30], available at <http://www.northeasterncircuit.co.uk/article.aspx?articleid=21> and Fisher, Ch 4, n 8, 1400, n 17.

<sup>258</sup> See ss 54-67 of the *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), ss 295-306 of the *Criminal Procedure Act* 1986 (NSW), ss 56-56G of the *Evidence Act* 1939 (NT), ss 67D-67F of the *Evidence Act* 1929 (SA) and ss 19A- 19M of the *Evidence Act* 1906 (WA).

<sup>259</sup> See ss 127A-127B of the *Evidence Act* 2000 (Tas).

<sup>260</sup> This theme is also pertinent to third party records such as medical, counselling or social service of victims in sexual cases, see *R v Combined Court at Stafford* [2006] EWHC Admin. See further Cossins, A, and Pilkinton, R, "Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials" (1996) 19 UNSW L Jour 222 and Murphy, T, and Whitty, N, "What is a Fair Trial? Rape Prosecution, Disclosure and the Human Rights Act" (2000) 8 Fem Legal Studies 143-167. The right to confidentiality of medical records, especially if relating to a sensitive condition such as HIV, has been recognized under the ECHR and any inroad of that right must not be undertaken lightly, see *Z v Finland* (1997) 25 EHRR 371.

<sup>261</sup> In England this is required by [3.4] of the *CPIA Code of Practice*. In Australia see, for example, *Boyce v Nunn* (1997) 138 FLR 475 and *Duncombe-Walls v Police* (1998) 197 LSJS 398. cf *R v Penney* (1998) 72 ALJR 1316 at 1319.

advisable for the prosecution to seek such material.<sup>262</sup> Though Richardson describes the suggestion that the defence should obtain third party material as “outmoded and wrong,”<sup>263</sup> in the ordinary course of events this may be preferable to the prosecution performing the work of the defence. The onus should lie with the defence to seek third party material by means of a subpoena if the third party is unwilling to release it. Any objection to its production can then be made by the third party. The third party has the standing to assert public interest immunity, even if the material has already been given to the prosecution.<sup>264</sup> Given the conflicting interests that the prosecution may well be subject to (between defending the legitimate interests of the third party,<sup>265</sup> acting as an advocate in an adversarial system seeking the conviction of the accused, complying with its duty of disclosure and being astute to promote a fair trial for the accused) and the fact that the third party is likely to be better placed than the prosecution to assert and explain any objection to the disclosure of the material,<sup>266</sup> it is logical for the third party, and not the prosecution, to argue public interest immunity or other available objection to the production of the material.<sup>267</sup> The common Australian practice of requiring the defence to obtain a subpoena for third party material (rather than for the prosecution to obtain it),<sup>268</sup> and for such a subpoena to be granted, issues of privilege aside, if the material serves a “legitimate forensic purpose”<sup>269</sup> represents the best solution.<sup>270</sup>

## **Part 11: Public Interest Immunity, The *Ex Parte* Claim: Can the Prosecutor Serve Two Masters?**

[6.11.1] The question of public interest immunity has caused perhaps the most difficult and intractable problems in respect of all the many issues that arise with respect to disclosure. Lord Justice Auld reported “widespread concern” by all parties about the operation of the system for claiming public interest immunity.<sup>271</sup> The operation of this immunity clearly demonstrates the inherent tensions in the prosecutorial roles of

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<sup>262</sup> From personal prosecution experience I recall the example of a victim in an uncorroborated sexual case who had made so many bizarre prior allegations of rape that the prosecution would have been amiss in its duty to determine if there was a realistic prospect of conviction unless it checked the credibility of the victim.

<sup>263</sup> Richardson, above n 257, at [27].

<sup>264</sup> See *R v Maxwell*, unreported, 16 May 1995, Central Criminal Court. See also Corker, Ch 5, n 43, 106 and 173 at [8.83].

<sup>265</sup> In England this can extend to asserting PII on behalf of the third party.

<sup>266</sup> Corker, Ch 5, n 43, 107 at [6.15].

<sup>267</sup> See *Ibid.*

<sup>268</sup> See for example, the general practice of the Commonwealth DPP in notifying the defence of the nature and location of relevant material held by a third party. The DPP does not obtain that material for the defence. See [4.5] of the *Statement on Prosecution Disclosure*. See also Cowdrey, N, “The Prosecutor’s Duty of Disclosure,” Speech delivered to the Public Defenders’ Conference, 8 May 2004, available at: <http://www.odpp.nsw.gov.au/speeches/Public%20Defenders%202004%20-%20Disclosure.htm>. See above n 35.

<sup>269</sup> See *Sankey v Whitlam* (1978) 142 CLR 1 and *R v Saleam* (1989) 16 NSWLR 14. See further *R v Spizziri* [2001] 2 Qd R 686 and *Ragg v Magistrates’ Court of Victoria* (2008) 179 A Crim R 568 for an apparent relaxation in the approach in Australia to subpoenas in criminal cases.

<sup>270</sup> See above n 35. In respect of sensitive counselling material see above n 258 and n 259.

<sup>271</sup> Auld, Ch 2, n 333, Ch 10 at [193].



adversarial advocate and minister of justice. In perhaps no other issue of disclosure is the obligation of the prosecutor to act as a minister of justice more crucial than in dealing with issues of public interest immunity in the absence of the accused.

[6.11.2] In relation to claims of public interest immunity it is clear that the motivation behind any such claim by the prosecution must be a legitimate desire to prevent divulgence of sensitive information that would genuinely be contrary to the public interest were it to enter the public domain. Claims should not be made to withhold information simply because disclosure would embarrass the prosecution or strengthen a defence application or, worse still, to prevent the accused from receiving a fair trial.<sup>272</sup> As Corker and Young note, "In essence if the sole or dominant motive for making an application is to gain a forensic advantage it should never be made."<sup>273</sup> There have been a number of cases in England showing this to be far from an idle fear,<sup>274</sup> and no less a figure than the Queen<sup>275</sup> has been embroiled in the debate.

[6.11.3] Prior to the landmark case of *Ward* the prosecutor was the sole arbitrator of what might be divulged where public interest immunity was claimed. This was open to abuse. If there was any material that the police and/or the prosecuting lawyer did not wish to reveal to the defence, then all they had to do was consider that its disclosure was not in the public interest and the defence, jury and judge never even get to hear about it. The "shortcomings of this unsatisfactory regime were vividly exposed"<sup>276</sup> in *Ward*. The Court of Appeal there took the opportunity to declare that it was for the court, and not for the prosecutor, to determine issues of public interest immunity. The court held that prosecution counsel could not overcome this rule by resort to the past "Gentleman's" practice of divulging sensitive material to defence counsel on an "off the record" or

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<sup>272</sup> Corker and Young, Ch 5, n 209, 127 at [4.75].

<sup>273</sup> *Ibid.*

<sup>274</sup> This issue arose in relation to the Matrix Churchill trial. The defendants were sensationally cleared of illegally exporting military equipment to Iraq after the trial judge insisted on the disclosure of certain official documents that supported the defence case which the prosecution had sought to claim public interest immunity. There were suggestions that the prosecution claim of PII had been in order to prevent the embarrassing disclosure of material that showed the apparent complicity of the British authorities in the delivery of military equipment to Iraq, see Ganz, G, "Matrix Churchill and Public Interest Immunity" (1993) 56 Mod LR 564 at 567-568 and Scrivener, A QC, "Opinion – I didn't want to do it – claims for public interest immunity should be treated far more carefully by the courts in the wake of evidence given to the Scott inquiry" (1994) 91 LSG 9(2). See also *R v Sutherland and Ors*, unreported, Nottingham Crown Court, 29 January 2002, No T20027203, Transcript Cater Walsh & Co, where Newman J expressed unease at the use by the prosecution of the PII procedure to seek to withhold probative material showing the police had unlawfully "bugged" private and privileged conversations between the suspects in a murder investigation and their solicitors. The case was stayed as an "abuse of process." See generally Abrams, F, "Forbidden Evidence, *The Guardian*, 2 December 2003

<sup>275</sup> Such concerns were raised after the trial of Paul Burrell, the butler of the late Princess of Wales, for the theft of items from his employer's estate. Burrell claimed that he had removed them for "safe keeping." It later transpired that the Queen recalled a conversation with Burrell that supported his explanation. The prosecution sought on the basis of PII to withhold this vital material at trial. The trial judge disagreed and Burrell was acquitted when the prosecution abandoned the case. There were assertions that this was a wrongful claim of public interest immunity. See Summerskill, B, "How Feuding and Snobbery Trapped an Innocent Man" *Observer*, 3 November 2002; Bates, S, Dyer, C, and Watts, N, "MPs criticise Queen over Burrell Case," *Guardian*, 4 November 2002 and Carslie, A Lord, "A Case of True Confidence and Extreme Loyalty," *The Telegraph*, 3 November 2002.

<sup>276</sup> *R v H* [2004] 2 AC 134 at 148.

“counsel to counsel” basis.<sup>277</sup> The court accepted defence counsel, Mr. Mansfield QC’s argument; that defence counsel was ethically precluded from withholding any material submitted to him or her by prosecution counsel from the defendant.<sup>278</sup> The position in *Ward* was subsequently clarified that, though it was the role of the court to assess claims of public interest immunity, it was the role of the prosecution and not the court to assess the relevance of the material in question.<sup>279</sup> Accordingly, only material assessed by the prosecution as “relevant” will need to be placed before the court for adjudication on a claim of public interest immunity.<sup>280</sup>

[6.11.4] In relation to the procedure employed to claim public interest immunity, the practice in England is to conduct an oral hearing before the court either in the presence or absence of the defence, depending on the sensitivity of the material in question.<sup>281</sup> In practice it appears that the majority of claims take place in the absence of defence counsel.<sup>282</sup> In Australia the procedure is very different in form, though in substance the difference is more apparent than real. If the prosecution in Australia is unwilling to reveal sensitive material to the defence the practice is for the prosecution to submit a confidential affidavit setting out the claim for public interest immunity.<sup>283</sup> Such affidavits, despite some judicial misgivings,<sup>284</sup> have now become “commonplace.”<sup>285</sup> In both Australia and England there is therefore an effective *ex parte* hearing at which the prosecution asserts public interest immunity for material about which the defence may have no knowledge, or perhaps, even no notice. The defence can ordinarily only guess at what topic is being ventilated, whether in chambers in England<sup>286</sup> or in the confidential affidavit in Australia.<sup>287</sup>

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<sup>277</sup> This practice of revealing confidential information to defence counsel on the basis that it was strictly for his or her ears only was an extension of the informal “Old Boys Act” approach to disclosure, see the discussion in Part 4 of Chapter 5.

<sup>278</sup> *R v Ward* [1993] 1 WLR 619 at 680-681. See also *DPP v Special Criminal Court* [1999] 1 IR 60 at 74-75 and *R v G & B* [2004] 1 WLR 2932. contra *Western Australia v Christie* (2005) 30 WAR 514 at 523 and the original view of the Special Criminal Court in *DPP v Special Criminal Court* [1998] IR 60 at 68-69.

<sup>279</sup> See *R v Melvyn & Dingle*, unreported, Central Criminal Court, 20 December 1993 and *R v Keane* [1994] 2 All ER 478 at 484-485.

<sup>280</sup> *R v H* [2004] 2 AC 134 at 155.

<sup>281</sup> See *R v Davis & Ors* [1993] 1 WLR 619. See further Taylor, Ch 5, n 259, for an overview of the English law of public interest immunity.

<sup>282</sup> Though *ex parte* applications were said in *Davis* to be an “exceptional” remedy in practice they tend to be common, a 2000 study found that at least half of PII claims in England were in the absence of the defence, see Plotnikoff and Woolfson, Ch 5, n 220, 88.

<sup>283</sup> See *R v Meissner* (1996) 76 A Crim R 81 at 85, *R v Rusmanto* (1997) 6 NTLR 68, *R v Cox (No 3)* [2005] VSC 249, *R v Mokbel (Ruling No 1)* [2005] VSC 410, *R v Khazaal* [2006] NSWSC 1061, *R v G* [2007] VSC 503 and *R v Benbrika & Ors (No 3)* [2007] VSC 283.

<sup>284</sup> See, for example, *R v Beibia*, unreported, Court of Criminal Appeal (NSW), 27 May 1982, Transcript, p 4-5; *R v Rusmanto* (1997) 6 NTLR 68 at [12]; *R v Cox (No 3)* [2005] VSC 249 at [13] and *R v Mokbel (Ruling No 1)* [2005] VSC 410 at [19].

<sup>285</sup> *R v Beibia*, Transcript, 6.

<sup>286</sup> See, for example, *R v Jackson* [2000] Crim LR 377 and *R v West* [2005] EWCA Crim 517.

<sup>287</sup> See, for example, *R v Mokbel (Ruling No 1)* [2005] VSC 410 at [24].

[6.11.5] The ethical burden imposed on the prosecution in dealing with issues of disclosure and public interest immunity is exacting in an *ex parte* or one sided procedure. The defence are not present or represented at such a hearing and the ability of the trial judge to assess whether disclosure of the sensitive material is necessary or even desirable for the defence is wholly dependent upon the material presented to him or her by the prosecution. In these cases the role of the prosecutor as a minister of justice becomes even more essential than usual in relation to disclosure. The consequences of incomplete, inaccurate or even misleading information being provided to the trial judge by the prosecution can prove profound. This is demonstrated by such cases in England as *R v Jackson*<sup>288</sup> and the debacle of the Customs and Excise cases arising from *R v Patel and Others*<sup>289</sup> and *R v Early and Others*.<sup>290</sup>

[6.11.6] The importance of frank and accurate disclosure by prosecution counsel in support of claims of public interest immunity, especially in the context of an *ex parte* application, was made clear by the Court of Appeal in a now notorious series of convoluted and linked cases involving the London City Bond warehouse. These cases concerned enormous frauds on the Revenue through the non-payment of duties on alcohol and tobacco.<sup>291</sup> The prosecuting authority, HM Customs and Excise, was aware of the fraudulent conduct and as part of its criminal investigation and to obtain evidence of criminal conduct had allowed it to continue. Customs, in breach of Home Office guidelines, enlisted the active assistance of the manager of the warehouse, Alfred Allington, and his brother, Edward, as participating informants.<sup>292</sup> A large number of defendants were eventually charged with offences arising from these activities. Various arguments were mounted highlighting deficiencies in the investigation and prosecution of the offences and asserting that the conduct of Customs in allowing the frauds to continue (and even inciting and encouraging them) amounted to an "abuse of process." The role of the Allington brothers in the investigation proved to be a pivotal issue. Their true roles were not revealed to either defence counsel or the various trial judges. Indeed, during applications for public interest immunity at the various trials prosecution counsel unwittingly provided false information about the brothers' role in the investigation. It was later revealed that the investigators had misled the trial judges, prosecution counsel and even their own colleagues<sup>293</sup> about their conduct of the investigations and had concealed the role and involvement of the Allington brothers. The courts made clear that such deceit would not be tolerated.<sup>294</sup> Rose LJ emphasized in *R v Early* that it was "a

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<sup>288</sup> [2000] Crim LR 377.

<sup>289</sup> [2002] Crim LR 304 and [2001] EWCA Crim 2505.

<sup>290</sup> [2003] 1 Cr App R 19.

<sup>291</sup> In 2002 the duty lost to the Exchequer was estimated at £352 million, see Ormerod, D, "Commentary [to *R v Patel*]" [2002] Crim LR 305 at 306. The lost revenue was later put at 668 million pounds, see Butterfield, Ch 5, n 159, 163 at [8.36].

<sup>292</sup> See Taylor (2005), Ch 5, n 239, 77-78 and Butterfield, Ch 5, n 159 for an overview of the case.

<sup>293</sup> One of the letters from an investigator in relation to the brothers' role was described by the Court of Appeal as "a masterpiece of obfuscation" [2001] EWCA Crim 2505 at [16].

<sup>294</sup> However, such bad faith is not a prerequisite for a successful appeal, see *R v Jackson* [2000] Crim LR 377 where even the unwitting provision of false information by prosecution counsel as a result of an honest misunderstanding by the investigators and not any dishonesty or malice (unlike as in *Early*) proved fatal for the prosecution.

matter of crucial importance to the administration of justice that prosecuting authorities make full relevant disclosure prior to trial and that prosecuting authorities should not be encouraged to make inadequate disclosure with a view to defendants pleading guilty.”<sup>295</sup> Rose LJ highlighted the importance of frank and accurate information from the prosecution:

Judges can only make decisions and counsel can only act and advise on the basis of information with which they are provided. The integrity of our system of criminal trial depends on judges being able to rely on what they are told by counsel and on counsel being able to rely on what they are told by each other. This is particularly crucial in relation to disclosure and PII hearings...Furthermore, in our judgment, if, in the course of a PII hearing or an abuse argument, whether on the *voire dire* or otherwise, prosecution witnesses lie in evidence to the judge, it is to be expected that, if the judge knows of this, or this court subsequently learns of it, an extremely serious view will be taken. It is likely that the prosecution case will be regarded as tainted beyond redemption, however strong the evidence against the defendant may otherwise be.<sup>296</sup>

[6.11.7] In these cases had the trial judges known the true picture it is likely in the view of Rose LJ that probative unused material would have had to be divulged. This material would have proved helpful to the defence.<sup>297</sup> The “very melancholy result”<sup>298</sup> of such deceit and non-disclosure was that in a series of cases arising from the investigation, the Court of Appeal felt compelled to quash numerous convictions, including even those in respect of defendants who had pleaded guilty.<sup>299</sup>

[6.11.8] Richardson echoes the concern expressed by the Court of Appeal. However, he asserts that such judicial exhortations are unlikely to cure the underlying mischief represented by *ex parte* hearings and sooner or later such hearings will run foul of the insistence of the European Court of Human Rights on “equality of arms”<sup>300</sup> and/or open justice.<sup>301</sup> Richardson poses the pertinent question, “How many other times have judges been misled without the truth ever becoming known?”<sup>302</sup>

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<sup>295</sup> [2003] 1 Cr App R 19 at [18].

<sup>296</sup> See [2002] EWCA Crim 1904 at [10]. See also Ormerod, above n 286, 306 and *R v West* [2005] EWCA 517.

<sup>297</sup> The court noted the defence could have either used this material in support of a claim of abuse of process and/or to attack the prosecution case at trial.

<sup>298</sup> *R v Gell & Ors* [2003] EWCA Crim 123 at [22].

<sup>299</sup> This view is consistent with such cases as *R v Edwards* [1996] 2 Cr App R 345 at 350 and *R v Mullen* [1999] 2 Cr App R 143 which emphasise that the fairness of the entire procedure outweighs the guilt of the accused. Apart from the 109 defendants who were eventually acquitted, one must also note the lost revenue (see above n 291) and the “colossal” (Butterfield, Ch 5, n 159, 163 at [8.37]) costs of the investigation and numerous trials and appeals.

<sup>300</sup> This is the doctrine under the *European Convention of Human Rights* to ensure that the defence must be evenly matched with the prosecution and enjoy access to any relevant material held by the prosecution, see *Jespers v Belgium* (1981) 27 DR 61.

<sup>301</sup> See also Ormerod, D, “Commentary [to *R v Jackson*]” [2000] Crim LR 378-379. The question of whether the *ex parte* procedure to resolve claims of PII is consistent with the ECHR is complex and is still not entirely resolved. The European Court of Human Rights in *Jasper & Fitt v United Kingdom* (2000) 30 EHRR 441 and *PG & JH v United Kingdom* [2002] Crim LR 308 upheld the *ex parte* procedure (in *Jasper* by a bare majority) but the court subsequently in *Edwards v United Kingdom* (2003) 15 BHRC 189 distinguished *Jasper* on tenuous grounds and stated that any procedure that denied the defence the opportunity to be present and take an active role in the proceedings failed to comply “with the requirements to provide adversarial proceedings and equality of arms”

[6.11.9] Concerns about the operation of the system for claiming public interest immunity have also been expressed in Australia. In *R v Mokbel (Ruling No 1)*<sup>303</sup> Gillard J, despite the established Australian case law allowing the use of confidential affidavits,<sup>304</sup> emphasized his reservations about such a practice. His Honour noted that as the defence were unaware of the contents of the affidavit they were denied an opportunity to test or challenge the material or the assertions in the affidavit and were unaware of the evidence grounding the court's decision. This leads to the "justifiable criticism" that the defence have been denied a fair hearing.<sup>305</sup> Gillard J emphasized that "the importance of doing justice is an essential condition to the administration of justice in this State."<sup>306</sup> His Honour asserted that the use of confidential affidavits was inconsistent with the oft-quoted observation in *R v Sussex Justices ex parte McCarthy*<sup>307</sup> of Lord Hewart CJ: "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."<sup>308</sup>

[6.11.10] The decision of the New South Wales Court of Appeal in *R v Francis*<sup>309</sup> illustrates that the concern expressed in *Mokbel* is real. The defence in *Francis* challenged an order for non-disclosure made by the trial judge on the basis of confidential affidavits and submissions. The defence had "enormous difficulties"<sup>310</sup> in challenging the order as they had no access to either the confidential affidavits or submissions and no direct knowledge of the basis of the claim for public interest immunity or why non-disclosure had been ordered.<sup>311</sup> The Court of Criminal Appeal heard from counsel arguing in favour of non-

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required by the ECHR. The court, noting the suggestion of Lord Justice Auld (see Auld, Ch 2, n 333, Ch 10 at [193]-[197]), suggested that one means of ensuring the *ex parte* procedure satisfied the ECHR was to appoint a special advocate (not the defence lawyer) to represent the interests of the accused at any *ex parte* application claiming PII. The House of Lords in *R v H* [2004] 2 AC 134, to add to the confusion, held that the ECHR did not necessarily require the appointment of special counsel in such cases and ordinarily the role of the trial judge would afford adequate protection to the accused but in appropriate cases the appointment of special counsel might be necessary to ensure that the assertions of the prosecution were properly tested and the accused's interests protected. The majority of the House of Lords further supported the special advocate regime (in the context of control orders on suspected terrorists) in *Secretary of the State for Home Department v MB & Or* [2008] 1 AC 440. However, this was not followed by the European Court of Human Rights in *A v UK* [2009] ECHR 301 which overturned the use of special advocates (without suggesting any alternative). This decision was reluctantly applied by the House of Lords in *Secretary of State for Home Department v AF* [2009] UKHL 28. This vexed issue remains to be resolved.

<sup>302</sup> For example in *R v Jackson* [2000] Crim LR 377 it was quite fortuitous that prosecution counsel realised that he had provided false information at the *ex parte* hearing when he was coincidentally instructed in a linked case and discovered the true situation.

<sup>303</sup> [2005] VSC 410.

<sup>304</sup> See above n 283.

<sup>305</sup> [2005] VSC 410 at [24].

<sup>306</sup> [2005] VSC 410 at [24].

<sup>307</sup> [1924] 1 KB 256.

<sup>308</sup> [1924] 1 KB 256 at 259.

<sup>309</sup> (2004) 145 A Crim R 233.

<sup>310</sup> Hunter, J, *et al*, *Litigation I: Civil Procedure* (7<sup>th</sup> ed) (Chatswood, LexisNexis Butterworths, 2005) p 362 at [8.110].

<sup>311</sup> (2004) 145 A Crim R 233 at 235.

disclosure and excluded the parties (including both defence and prosecution counsel) and had regard to the same confidential affidavit and submissions as had been presented to the trial judge. The Court of Criminal Appeal also accepted the claim of public interest immunity, but noted that on the basis of what little it knew it was unconvinced of the significance of the subpoenaed material to the defence case. The court accepted, however, that its reasoning on this point was less than satisfactory:

In the absence of informed argument on behalf of the applicant, it is difficult for this Court to evaluate the importance to the applicant’s case of the material which it has read...[the Court is] conscious that this Court is not fully aware of the detail of the prosecution allegations, the applicant’s response to them, or the evidence to be adduced. It is entirely possible that contained in the documents, is some material that may have a bearing on some aspect of the prosecution case, or the defence response, or one or more of the witnesses on whom the prosecution will rely. There may be significance in the documents lost upon members of a Court who do not have access to counsels’ briefs.<sup>312</sup>

*Francis* highlights the unfair consequences that can result from an *ex parte* procedure which “can reduce the process for determining the claim [for public interest immunity] to something bordering on a farce.”<sup>313</sup>

[6.11.11] A fundamental argument against *ex parte* regimes governing claims for public interest immunity is that such applications, especially in light of cases such as *Early*, place excessive and unjustified trust in the prosecution lawyer to deal faithfully and objectively with issues of disclosure. Any *ex parte* system that allows the prosecution to claim public interest immunity without extending an opportunity to the defence to consider material upon which the prosecution relies and to respond to the prosecution’s arguments is flawed. Ormerod notes that “many retain serious misgivings about how defendants can have a fair trial in the absence of knowledge of information that might be of value.”<sup>314</sup> He argues persuasively that it is untenable to rely on prosecution counsel to safeguard the accused’s right to a fair trial. “The rhetoric of protection being provided by prosecuting counsel acting as ministers of justice can never be a complete substitute for defence counsel addressing the judge orally.”<sup>315</sup> The prosecutor in an *ex parte* system is subject to irreconcilable tensions.<sup>316</sup>

[6.11.12] The solution of employing a “special advocate”<sup>317</sup> to represent the interests of the accused has been suggested in England.<sup>318</sup> However, there are ethical<sup>319</sup> and practical

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<sup>312</sup> (2004) 145 A Crim R 233 at 237.

<sup>313</sup> *Hunter et al*, above n 305, 362.

<sup>314</sup> Ormerod, above n 4, 117.

<sup>315</sup> *Ibid*, 125.

<sup>316</sup> Not only must the prosecutor act as both minister of justice and adversarial advocate in the absence of the defence but he or she may also have to represent the interests of the party, often the police or Social Services, seeking to invoke public interest immunity. cf *R v GW and EW* [1997] 1 Cr App R 166 which upheld the practice of the judge relying on the third party, rather than prosecution counsel, to outline what was relevant or not.

<sup>317</sup> A lawyer retained as an officer of the court to represent, not the accused, but rather the interests of the accused and different to the accused’s own lawyer, see *R v H* [2004] 2 AC 134 at 150-151.

<sup>318</sup> See above n 301. This procedure has been used in England in immigration cases with sensitive material (see *Chahal v United Kingdom* (1997) 23 EHRR 413) and in criminal cases (see *R v Yilmaz* [2007] EWCA Crim 308 and *ES v Northampton Crown Court* [2010] EWHC Admin 723).

arguments against this process, including its potential cost.<sup>320</sup> Corker and Parker describe it as a "cause of last resort"<sup>321</sup> and the criminal courts in both England<sup>322</sup> and Australia<sup>323</sup> have proved reluctant in practice to appoint such advocates. Nevertheless, whilst the special advocate solution is not ideal,<sup>324</sup> it may be better than nothing. As Murphy describes:

If the goal is, as it should be, to achieve an adversarial process...Special counsel can never represent the views of the defence as effectively as the defence advocate. But there will be cases where the defence can be given little or no information, where the defence advocate is powerless to assist the accused, and in such cases special counsel is better than no counsel.<sup>325</sup>

## **Part 12: The Lessons from the English Experience of Disclosure, How to Put the Golden Rule into Practice: Mission Impossible?**

[6.12.1] There is no place in an area as crucial to the fairness of the criminal trial or the integrity of the criminal process as disclosure for the adversarial or partisan tactics demonstrated by the prosecution in cases such as *Ward* or *Mallard* or by the hapless Mr. Spencer in *R v Livingstone*.<sup>326</sup> The issue of disclosure is too important to the fundamental right of an accused to a fair trial<sup>327</sup> to leave to informal personal arrangements and there can be no return to the past "Old Boys Act" approach.<sup>328</sup> There is an obvious need for a formal system of disclosure that is governed by the notion of the prosecutorial role as a minister of justice.

[6.12.2] However, it is acknowledged that even on an application of the prosecutorial role of a minister of justice, there are limits to the extent of the duty of full disclosure. In *DPP*

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<sup>319</sup> The relationship between the special advocate and the accused is quite different to that between the accused and his or her own lawyer. The special advocate cannot pass any sensitive information onto the accused and is not responsible to, and cannot take instructions from the accused. The special advocate acts "in a way hitherto unknown to the legal profession" *R v H* [2004] 2 AC 134 at 150.

<sup>320</sup> See *R v H* [2004] 2 AC 134 at 150-151. See also Butterfield, Ch 5, n 159, 266 at [12.57] and Corker and Parkinson, Ch 5, n 122, 166-169.

<sup>321</sup> *Ibid*, 167.

<sup>322</sup> See *R v H* [2004] 2 AC 134 at 150-151 and *R v Ebcin & Ors* [2005] EWCA Crim 168.

<sup>323</sup> The solution of special counsel to represent the interests of the accused was raised in Australia for the first time in *R v Lodhi* [2006] NSWSC 586. Though Whealy J considered special counsel need not be appointed on the facts of that case he recognised that, in principle, special counsel could be appointed in an appropriate case. See also *R v Khazaal* [2006] NSWSC 1061 at [51].

<sup>324</sup> The problem as arises often in practice is that it is far easier to identify the flaws of the present English system for resolving claims of public interest immunity (and by implication any similar system such as Australia which involves confidential submissions) than it is to devise a fair but workable solution to replace it.

<sup>325</sup> Murphy, P, *Murphy on Evidence* (10<sup>th</sup> ed) (Oxford, Oxford University Press, 2007) p 423.

<sup>326</sup> [1993] Crim LR 597.

<sup>327</sup> See *R v Winston Brown* [1994] 1 WLR 1599 at 1606. See further Chapter 5 at [5.9.1].

<sup>328</sup> See Part 9 of Chapter 5 at [5.9.9].

(NSW) v *Webb*<sup>329</sup> Mason P emphasised that the duties of the prosecution with respect to disclosure, whilst broad were not unlimited:

Like the ‘reasonable man’ beloved of tort law, the prosecuting authority will not be assumed to have had ‘the courage of Achilles, the wisdom of Ulysses or the strength of Hercules’...Nor will her or she have the ‘the prophetic vision of a clairvoyant’.<sup>330</sup>

[6.12.3] The duty of disclosure cannot be open ended. As Mack and Anleu observe, “There will, of course, be reasonable practical limits to even a rule of full disclosure.”<sup>331</sup> John Phillips QC, when Director of Public Prosecutions of Victoria,<sup>332</sup> observed, “The duty does not mean the handing of the contents of the prosecution file to the accused’s adviser in toto. Nor does it mean that details of every interesting irrelevancy should go the defence.”<sup>333</sup> Though the prosecutor’s duty may be “onerous,” the prosecutor is not expected to be “omniscient.”<sup>334</sup> In essence, as Sprack asserts, “The principle is that the prosecution should be scrupulously fair to the accused, but need not be quixotically generous.”<sup>335</sup> Barbara Mills QC, the English Director of Public Prosecutions, in 1994, whilst recognising the need for sufficient disclosure to an accused to ensure a fair trial emphasised the need for some “balance” in the disclosure process between prosecution and defence.<sup>336</sup>

[6.12.4] The difficulty lies in identifying the point at which the prosecutorial duty of disclosure ends. One possible limit may be with respect to third party material. As suggested earlier, at this point, the balance might shift in favour of the adversarial aspect of the prosecutorial role and acknowledgement that this precludes the prosecutor becoming a “private investigator” at the behest of the defence.

[6.12.5] The formulation in England of a system of disclosure that is fair but still reflects the practical realities of the modern criminal justice system has proved (and probably will continue to prove) elusive. In 2005, Lord Goldsmith, the British Attorney-General, asserted that, notwithstanding, the significant problems of principle and practice identified in this Chapter, there was no alternative to the English statutory model of disclosure. “There is no appetite for a new disclosure system – indeed, no one can agree of what amounts to a viable system. We need to make the present law work.”<sup>337</sup>

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<sup>329</sup> (2001) 52 NSWLR 341.

<sup>330</sup> (2001) 52 NSWLR 341 at 349. One might speculate, given the extent of the demands placed on prosecutors in England by the post-*Ward* requirements of disclosure, whether Mason P’s confidence may prove to be misplaced.

<sup>331</sup> Mack and Anleu, Ch 4, n 19, 89.

<sup>332</sup> John Phillips later served as Chief Justice of Victoria.

<sup>333</sup> Quoted in *R v TST* (2002) 5 VR 627 at 650.

<sup>334</sup> *R v Cannon*, unreported, Court of Appeal, 30 January 1995, Transcript: John Larkin.

<sup>335</sup> Sprack, J, *A Practical Approach to Criminal Procedure* (10<sup>th</sup> ed) (London, Oxford University Press, 2004) p 323.

<sup>336</sup> Mills, B, Tom Sargeant Memorial Lecture, 28 November 1994, quoted in Niblett, Ch 5, n 43, 30.

<sup>337</sup> Goldsmith, Ch 5, n 219, 29. See also the *Criminal Procedure Rules* 2005, the *Protocol for the Control and Management of Unused Material at the Crown Court* at [1] and the discussion in *R v K* [2005] EWCA Crim 724.



[6.12.6] However, most commentators do not share Goldsmith's confidence in the CPIA. On almost any definition the CPIA has not proved a success.<sup>338</sup> The problem is that no scheme has yet been proposed that has managed to attract universal acclaim and uncritical acceptance. Lord Justice Auld observed that while there had been almost universal criticism of the operation of the CPIA, opinions were sharply divided as to what scheme should replace it: "Reform is needed but it is clear that there is no consensus as to what form it should take."<sup>339</sup>

[6.12.7] The difficulty in devising a system of disclosure that is fair, effective and efficient cannot be underestimated.<sup>340</sup> The operation of both the short lived *Ward* common law model and the CPIA in England has proved contentious and problematic. It is far from clear that the recent amendments to the CPIA tightening the requirements on all parties, though particularly the defence, will improve the operation of the English disclosure system. The CPS Inspectorate observed in 2008, "We recognise that it is impossible to gain the whole hearted acceptance of all parties to the existing disclosure regime."<sup>341</sup> A number of other commentators have suggested that any changes to the formal procedure will not necessarily overcome the underlying flaws in the system, particularly the ingrained cultural attitudes of the players.<sup>342</sup> Zanders argues that the formulation of a workable system of disclosure is "Mission Impossible":

The problem is that the culture of each of the players – the police, the prosecutors and the judiciary – is fundamentally out of tune with the disclosure rules. The police don't want to disclose, the prosecution lawyers have not got the raw material or the time to check closely what they get from the police,<sup>343</sup> and the defendant has no interest in being helpful either to the prosecution or the smooth running of the system. As to the judge, securing compliance with the disclosure rules is likely to be beyond the powers of even the most enthusiastic case managing judge.<sup>344</sup>

[6.12.8] Taylor concludes that adversarial nature of the criminal process, in particular the tension its places on the prosecutorial role, will continue to frustrate the operation of any disclosure regime, modified or not:

...it is suggested that all such measures are of limited value when the investigational culture remains so influenced by the crime control value system. Against this background it is difficult to envisage any reform to the disclosure regime which might

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<sup>338</sup> Corker and Parkinson, Ch 5, n 122, 20.

<sup>339</sup> Auld, Ch 2, n 333, Ch 10 at [168]

<sup>340</sup> See Butterfield, Ch 5, n 159, 251 at [12.7]. See also Part 6 of Chapter 5 at [5.6.14].

<sup>341</sup> HMCPSI, above n 5, 9 at [2.34].

<sup>342</sup> See Wells, above n 139, 51-75, Quirk, Ch 5, n 242, 57-59 and Redmayne, above n 4, 461-462. Similar views have been expressed in an Australian context, see Gibson, R, "The *Crimes (Criminal Trials) Act 1999*- a Radical Change" (1999) Law Inst J 50 at 52-53.

<sup>343</sup> One might add to this a continuing adversarial attitude by some prosecutors to questions of disclosure, see Quirk, Ch 5, n 242, 52-53.

<sup>344</sup> Zander, above n 157, 618.

address the structural and cultural forces which appear to make the concept of revealing information to the defence so problematic.<sup>345</sup>

[6.12.9] The lack of confidence in the future operation of the CPIA and the continued problems should not, however, obscure the legacy of both the historical and recent experience in England of wrongful convictions due to prosecution non-disclosure. This disturbing history is such that strict adherence to the “golden rule,” as suggested by Lord Hope in *R v H*,<sup>346</sup> for the prosecution to make full disclosure to the defence of any relevant material in its possession is unavoidable.<sup>347</sup>

[6.12.10] It is one thing to declare that the “golden rule” is to insist on full disclosure of any relevant material. It is, however, another thing, to define the practical extent of this duty. Though it is not a simple task it is my argument that it is, nevertheless, possible to suggest some general features of the framework of a system of formal disclosure that is both fair and workable. The features of a system of disclosure that is fair, effective and efficient and accords with the prosecutor’s role as a minister of justice with respect to disclosure are as follow:

1. Provide a workable definition of the “Prosecution” for the purposes of disclosure. The logical limits of this definition are the police, other investigators and any expert witnesses retained by them. It would exclude other agencies or departments of the State and third parties, victims or witnesses.
2. Acknowledge that it is unrealistic to expect the police given their investigative role to deal impartially and objectively with questions of disclosure. The police should be required to gather, retain and accurately list material gathered in the course of the course of an investigation, but they should not have a role in determining its relevance.
3. Recognise the limits to the prosecution’s ability in making disclosure to judge issues of relevance for the defence objectively and completely. Given the inherent tensions in the dual prosecutorial roles of minister of justice and adversarial advocate, prosecution counsel may (even if purporting to act in the role of the transparent minister of justice) be unable to escape adversarial influences and deal objectively with issues of disclosure, especially in determining issues of relevance.
4. Take account of the practical problems for prosecution lawyers in dealing with disclosure. The width of the test of relevance, the possible scale of the investigation, the reluctance of the defence (even where there are mandatory defence disclosure obligations) to reveal the nature of the intended defence and the fact that the prosecution may well not know the precise, or even the

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<sup>345</sup> Taylor, C, “Disclosure Strategies and Dilemmas within Routine Criminal Case Construction by UK Detectives” (2007) p 14, available at SSRN: <http://ssrn.com.abstract=995864>.

<sup>346</sup> [2004] 2 AC 134.

<sup>347</sup> [2004] 2 AC 134 at 147.

broad, nature of the defence to be deployed at trial all render it difficult for the prosecution to discharge its duty of disclosure.

5. Recognise that though there is substance to the accusation that defence lawyers have abused their entitlement to disclosure, it cannot be forgotten that the defence lawyer has a duty to investigate and test the prosecution case fully on behalf of his or her client and take any legitimate points.
6. Acknowledge that prosecutors are operating in an adversarial system which imparts to them a public duty to secure the conviction of the accused (as discussed in Chapter 4). This has implications for the scope of the duty of disclosure. Specifically it suggests that the prosecutor should not be placed in the position of "private investigator" for the defence where third party material is concerned.
7. Acknowledge that prosecutors' duties to the administration of justice includes a duty to achieve a fair trial for victims and prosecution witnesses.<sup>348</sup> In consequence any system of disclosure should avoid placing prosecutors in a position that would conflict with this duty by requiring the pursuit and disclosure of sensitive or confidential third party material. This is particularly the case where that material may be used to attack the credibility of prosecution witnesses, where disclosure would be against the best interests of those witnesses or would run counter to public criminal justice interests.

[6.12.11] These considerations justify a reformulation and refocusing of the prosecution duty of disclosure. They suggest the most reliable means of achieving the necessary degree of disclosure is to afford the defence access, questions of public interest immunity aside, to any material gathered by the prosecution in the course of its investigation. If the material is too voluminous to be copied and provided to the defence by whatever means,<sup>349</sup> the defence should be entitled to inspect it. The defence are best equipped to determine what is relevant to their case.

[6.12.12] The prosecution's duty of disclosure should not extend to procuring information from a third party, especially as to issues of credibility of a prosecution witness. The prosecutor's role as a minister of justice should not extend to it effectively performing the role of the defence. The defence should pursue their own enquiries.

[6.12.13] Where public interest immunity is concerned, it is apparent that it raises intractable problems of principle and practice. The *ex parte* system is flawed but it is difficult to identify a satisfactory replacement. Accordingly, practical reality suggests that while the notion of the "special advocate" is less than ideal, it is "better than nothing."

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<sup>348</sup> It is now accepted that victims and witnesses have a legitimate interest in the conduct and outcome of criminal proceedings, see *AG's Ref (No 3 of 1999)* [2001] 2 AC 91 at 118. See also the discussion in Part 7 of Chapter 4.

<sup>349</sup> With technological advances it may be possible to provide the unused material, even in a complex case, in an electronic format, see Epp, Ch 5, n 119, 70-71.

### **Part 13: The Application of the English Disclosure Model to Australia: If it Ain’t Broke Why Fix It?**

[6.13.1] In light of the English experiences one might have thought that any judge or legislator would have hesitated before importing the English law of disclosure to another jurisdiction such as Australia and if any such law was to be adopted, it would have only been after exhaustive judicial, legislative or executive deliberation. However, notwithstanding the problems of both principle and practice that have arisen in England with respect to disclosure, the developments in England ultimately proved persuasive in Australia and with the High Court’s recent decision in *Mallard*, Australia has now embraced the English law on disclosure. Whether this is necessarily a positive development, opinion in light of the English experience may be divided.

[6.13.2] The need for importing the same onerous and contentious requirements imposed upon English prosecutors to Australia might be questioned as Australia appears to have largely been spared,<sup>350</sup> the spate of wrongful convictions and successful appeals due to prosecution’s non-disclosure that has occurred in England. After all, as was discussed in Chapter 3, as long ago as 1836 the Australian colonial courts accepted that one part of English criminal procedure might be ill suited to the very different circumstances of Australia.<sup>351</sup> If that observation was true in the 1830s it is certainly true now that decisions of even the highest English courts are no more than persuasive in Australia.<sup>352</sup>

[6.13.3] Even the English courts have accepted that their model of disclosure might be ill suited in other common law jurisdictions. In *R v Berry*<sup>353</sup> the Privy Council considered a defence challenge to the fact that the prosecution disclosure requirements in Jamaica fell substantially short of those existing, even as early as 1992, in England. Lord Lowry, delivering the judgment of the Privy Council, accepted that the role of the prosecuting lawyer as a minister of justice dictated that there should be adequate disclosure by the prosecution in any case to ensure fairness is accorded to the accused.<sup>354</sup> However, any such duty was not open ended and Lord Lowry rejected the defence contention that “the comprehensive principles, almost amounting to criminal discovery, which the defendants

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<sup>350</sup> It may be that such wrongful convictions have not been uncovered in Australia to the same extent as in England or the United States, see Weathered, L, “Does Australia need a Specific Institution to Correct Wrongful Convictions?” (2007) 40 Aust & NZ Jour Crim 179 at 188.

<sup>351</sup> *R v Farrell & Ors* NSW Select Cases (Dowling 1828-1844) 136 at 148 (see also *Sydney Gazette*, 30 July 1831). See further the discussion in Part 3 of Chapter 3 at [3.3.3].

<sup>352</sup> See *R v Parker* (1963) 37 ALJR 1 and *R v Viro* (1978) 141 CLR 85. See further Chapter 3, n 319.

<sup>353</sup> [1992] 2 AC 364.

<sup>354</sup> In *Berry* two prosecution witnesses had given evidence at a murder trial that had substantially differed from their original accounts to the police. Following the then practice in Jamaica the prosecution had notified the defence of the fact that had been disparities between the accounts but the defence had not been supplied with the original statements for the purposes of cross-examination. The prosecution justified their refusal to furnish the defence with the statements owing to the strong fear of witness intimidation. Prosecution counsel noted that a number of prosecution witnesses had been killed in Jamaica prior to other criminal trials [1992] 2 AC 364 at 369 (such fears can be very real, see Chapter 5, n 13). Nevertheless, the Privy Council found that the non-disclosure of the earlier inconsistent accounts was unfair and they should have been provided.

have attempted to rely upon" existing in other common law jurisdictions should apply in Jamaica.<sup>355</sup> His Lordship observed:

Having examined the practice in different common law jurisdictions, their Lordships ... take the opportunity of saying that in a civilised community, the most suitable ways of achieving such fairness (which should not be immutable and require to be reconsidered from time to time) are best left to, and devised by, the legislature, the executive and the judiciary which serves that community and are familiar with its problems.<sup>356</sup>

[6.13.4] Given that Australia has been apparently largely<sup>357</sup> spared the same catalogue of wrongful convictions attributable to non-disclosure as has plagued the English criminal justice system, it could be argued that it was unnecessary to import to Australia the English model of disclosure. The simple answer to any such argument is provided by Niblett:

What is perhaps surprising is how other jurisdictions have managed to survive without becoming embroiled in the plethora of disclosure issues which have overwhelmed the courts of England and Wales. The answer may lie in the fact that disclosure is more easily affected in an inquisitorial judicial system, but this does not provide a complete explanation as some adversarial criminal systems still permit disclosure to be carried out on an informal basis with a minimum of rules and virtually no legislation. As we have seen to our cost, it takes only one miscarriage of justice to reveal deficiencies; and is there a criminal jurisdiction in the world which can place its hand on its judicial heart and say with absolute confidence that it does not have a 'Judith Ward' lurking in its system.<sup>358</sup>

[6.13.5] It would be naïve to assume that the Australian criminal justice system possesses a degree of infallibility that is lacking in other jurisdictions such as England and the United States.<sup>359</sup> It would be similarly naïve to argue in light of the all too regular revelations of police misconduct in Australia,<sup>360</sup> that Australian investigators necessarily possess a degree of objectivity and transparency that is lacking on the part of their English counterparts. The partisan approach to disclosure adopted in *Mallard* by not only the police but arguably even by prosecution counsel supports this proposition. As Niblett argues it only takes one such case to vindicate the need for a formal system of frank disclosure. The Chief Justice of Victoria in a recent speech highlighted in apposite terms that the ethical duty of the prosecutor as a minister of justice translates to a comprehensive duty of disclosure and that recourse to previous informal practices is now obsolete.<sup>361</sup>

[6.13.6] The basic principle must now be firmly accepted. The unassailable thrust of modern judicial authority across the common law world is that, as was emphasised by

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<sup>355</sup> [1992] 2 AC 364 at 377.

<sup>356</sup> [1992] 2 AC 364 at 376.

<sup>357</sup> cf *R v Button* (2002) 25 WAR 382, *R v Beamish* [2005] WASCA 62 and *R v Mallard* (2005) 224 CLR 125.

<sup>358</sup> Niblett, Ch 5, n 43, 207.

<sup>359</sup> See Weathered, above n 350, 180-181 and 187-188.

<sup>360</sup> See the references cited in Chapter 5, n 155.

<sup>361</sup> Warren Ch 2, n 74, 18-19. See also Part 9 of Chapter 5 at [5.9.9].

Kirby J in *Mallard*,<sup>362</sup> the prosecution must operate in a climate of transparency.<sup>363</sup> Disclosure is vital to the fundamental right of an accused to fair trial. The accused is entitled to any material in the possession of the prosecution that may be relevant in the proceedings (subject to narrow exceptions in relation to material attracting public interest immunity), whether such material is to be relied upon by the prosecution as evidence or is unused material and whether it helps or hinders the prosecution case. The argument in favour of such a comprehensive system of formal disclosure in both England and Australia is ultimately irresistible. As Frater concludes:

Providing full disclosure is among the most important ‘minister of justice’ functions of Crown counsel. It may require great persistence, and undoubtedly calls for the exercise of careful judgment in ensuring all appropriate privilege claims are asserted. It does not demand, however, that the Crown litigate all marginal requests for information. Decisions to resist disclosure should involve some readily identifiable principle (e.g., the information is privileged) rather than be prompted by the difficulty of complying. Disclosure may be very expensive, but the costs of non-disclosure are now prohibitive.<sup>364</sup>

[6.13.7] Whilst there may be debate as to what model is best equipped to deal with questions of disclosure, there is a clear need for a formal and structured regime. It is argued here that any such regime should incorporate the features delineated above in Part 12 of this Chapter. Whilst there are significant problems of principle and practice involved in devising a system of disclosure that is acceptable to all, one that incorporates these matters would have the capacity to operate fairly, effectively and efficiently and to fulfil the notions of just disclosure described by Frater.

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<sup>362</sup> (2005) 224 CLR 125 at 151.

<sup>363</sup> The prosecution in the performance of all its functions must now act in a spirit of openness and under public scrutiny and exposure, see Angolini, Ch 1, n 5. See further the discussion in Part 4 (1) of Chapter 1.

<sup>364</sup> Frater, R, “The Seven Deadly Prosecutorial Sins” (2002) 7 Can Crim LR 209 at 216.

# CHAPTER 7

## THE “LONELY” AND “HEAVY” RESPONSIBILITY OF THE PROSECUTION IN CALLING WITNESSES: MINISTER OF JUSTICE OR ADVERSARIAL ADVOCATE?

*The extent of the prosecutor’s discretion in calling witnesses at trial is subject to the tension between his or her adversarial and minister of justice roles. This Chapter considers the historical development of the prosecutorial role in calling witnesses. It considers the historical rationales for the conflicting prosecutorial roles of minister of justice and adversarial advocate in this area and suggests that both rationales are explicable by reference to wider historical factors in the legal system as discussed in Chapter 2. This Chapter further examines the inconsistent course of the historical cases and suggests that the division of judicial opinion appears may be explained according to whether the courts favoured the minister of justice or adversarial roles. It is notable, however, that the courts ultimately and clearly rejected the minister of justice role, despite its historical rationale, in favour of a broad degree of prosecution discretion.*

### Part 1: Introduction

“The description of that responsibility [of the prosecution in calling witnesses]... emphasises that the prosecution’s role in this regard is a lonely one, the nature of which is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system. It is not only a lonely responsibility but also a heavy one.”<sup>1</sup>

[7.1.1] This was the observation of the High Court in 1984 in *R v Apostilides*<sup>2</sup> when describing the prosecution’s task in considering what witnesses to call as part of the prosecution case at trial. Kennedy LJ remarked in 2000, “It is for the prosecution to identify the matters which have to be proved, and then to take such steps as are necessary to ensure that what is not admitted is proved by means of oral evidence or

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<sup>1</sup> *R v Apostilides* (1984) 154 CLR 563 at 575-576.

<sup>2</sup> (1984) 154 CLR 563.

written evidence before the close of the prosecution case.”<sup>3</sup> The renowned “one golden thread” of common law criminal jurisprudence is that “it is the duty of the prosecution to prove the prisoner’s guilt beyond reasonable doubt.”<sup>4</sup> Accordingly, as stated by Kennedy LJ, it is necessary for the prosecution to tender sufficient evidence in order to prove its case.

[7.1.2] However, Kennedy LJ’s proposition is deceptively simple. It ignores the far broader question of what approach the prosecution should adopt in relation to what evidence to adduce for the purposes of trial. What considerations must the prosecutor have regard in deciding which witnesses to call? The prosecution in both Australia and England still operates against the backdrop of a criminal process that remains firmly adversarial in character. A central premise of such a system is that each side has the responsibility for deciding how to present its case and each side is free to choose what witnesses to call in support of its case. This, however, leaves a number of questions unanswered, specifically the extent to which the prosecutor is entitled to have regard to purely “adversarial” considerations and to adduce only that evidence and to call only those witnesses that will enable the prosecution case to be presented in its most persuasive light; and the extent to which the prosecutor in his or her “lonely” and “heavy” decision is subject to competing considerations such as notions of “fairness” to an accused that might influence how he or she approaches this task.<sup>5</sup>

[7.1.3] One school of thought emphasises what can be described as the minister of justice dimension of that role. As early as 1896 an Irish commentator noted:

It has hitherto been a general opinion that, the object being not to find the prisoner guilty but to do justice, it is the duty of the prosecution to bring out the whole of the facts both in the prisoner’s favour and against him.<sup>6</sup>

[7.1.4] A similar view was expressed in 1944 in *R v Treacy*<sup>7</sup> by Humphreys J:

The prosecution have no right to pick out such evidence as they think right to give to the jury in a criminal case. They have no right of that sort at all. Their duty is to put before the jury every fact that is relevant to the issue being tried by them and known to the prosecution and to prove it, whether it in fact helps the accused or is against him. That is the duty of the prosecution.<sup>8</sup>

[7.1.5] This notion of the prosecution’s role was reiterated by Winneke P in 1998 in *R v Rayner*<sup>9</sup> when His Honour referred, with apparent approval, to:

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<sup>3</sup> *Jolly v DPP* [2000] Crim LR 471 (otherwise unreported), 31 March 2000, Divisional Court, No CO/1193/99.

<sup>4</sup> *Woolmington v DPP* [1935] AC 462 at 481-482 per Viscount Sankey LC.

<sup>5</sup> The modern requirement to have regard to the views and welfare of victims and witnesses and the wider public interest may also be significant to the prosecution in the presentation of its case and deciding which witnesses to call at trial. See below n 193.

<sup>6</sup> (1896) 30 Ir Law Times 395 at 396.

<sup>7</sup> [1944] 2 All ER 229.

<sup>8</sup> [1944] 2 All ER 229 at 235.

<sup>9</sup> [1998] VICSC 37.



...the long tradition in that it is the prosecutor’s responsibility, subject to discretionary exceptions, to call witnesses whose names are on the back of the indictment or presentment or whose evidence is material to the case, whether such evidence is favourable to the accused or unfavourable. However this responsibility derives from the wider duty which is upon the Crown to act with fairness and with the single aim of establishing the truth.<sup>10</sup>

[7.1.6] However, this view has not been universally shared. As long ago as 1796 in *R v Wilson*<sup>11</sup> prosecution counsel, Mr. Const, dismissed the complaint of defence counsel as to the prosecution’s refusal in that case to call at trial an accomplice who was named on the “back of the indictment.”<sup>12</sup> Mr. Const declared that it was purely an issue for him whom he chose to call:

It is a novel doctrine indeed, that the Counsel for the prisoner shall say in what manner the Counsel for the prosecution shall conduct his case, it is entirely unprecedented...if I thought I had conducted myself uncandidly, I should be very sorry, but when I have a case, full, complete and convincing, I am not obliged to call a witness to contradict the witnesses already produced, under the idea of promoting justice; and therefore I am to use my discretion whether I shall call a witness or not.<sup>13</sup>

[7.1.7] Diplock LJ in 1964 *Dallison v Caffery*<sup>14</sup> adopted a similar approach. Like Mr. Const, His Lordship also dismissed:

...the erroneous proposition that it is the duty of a prosecutor to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute not to defend.<sup>15</sup>

[7.1.8] The view advanced by Mr. Const and Diplock LJ accords with the role of the prosecutor as an involved party and active advocate within an adversarial criminal justice system. Such a role envisages the prosecutor, as outlined in Chapter 4, as possessing a legitimate interest in seeking the conviction of a defendant. The prosecution case, as was stated by Hayne J in *R v Libke*,<sup>16</sup> must be presented within the context of an adversarial

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<sup>10</sup> [1998] VICSC 37. Winneke P’s reference to the “calling” of a witness means calling him or her as part of the case of the party calling them.

<sup>11</sup> Central Criminal Court, 30 November 1796, No T17961130-42.

<sup>12</sup> This expression derived from the old practice in England of writing the names of the witnesses who had given evidence before the Magistrate at committal in the form of a deposition and the grand jury on the reverse of the indictment. Though procedures are now quite different, the expression of calling those witnesses named on the “back of the indictment” has persisted to the present day in both Australia and England. Hinton has noted that in most Australian jurisdictions it is still customary to endorse on the back of the information, indictment or presentment the names of the potential prosecution witnesses, see Hinton, M. “The Prosecutor’s Duty with Respect to Witnesses: pro Domina Veritae” (2003) 27 Crim LJ 260 at 263-264, n 15. In England in *R v Hickman* (*The Times*, 7 December 1984) the Court of Appeal noted that any principles relating to the calling of witnesses named on the back of the indictment still applied. Though there was no such thing anymore as the recording the names of the witnesses on the back of the indictment the names of the witnesses relied upon by the prosecution for the purposes of committal hearing were still recorded. The prosecution witnesses included in the “committal bundle” (that is the evidence adduced by the prosecution at committal) were still deemed to be named on the “back of the indictment.”

<sup>13</sup> Central Criminal Court, 30 November 1796, No T17961130-42.

<sup>14</sup> [1964] 2 All ER 610.

<sup>15</sup> [1964] 2 All ER 610 at 622.

<sup>16</sup> (2007) 81 ALJR 1309.

process in which each side “is free to decide the ground on which it or he will contest the issue, the evidence that they will call, and what questions whether in chief or in cross-examination will be asked.”<sup>17</sup> In an adversarial system, “The decision whether to call or not to call witnesses in a criminal trial is a decision for the parties.”<sup>18</sup>

[7.1.9] In contrast Humphreys J’s and Winneke CJ’s views closely accord with the traditional notion of the prosecutor as a minister of justice, whose duty and purpose is to act with the utmost fairness in order to establish the truth. As an English commentator, in this context, in 1936 noted:

It is a truism that in criminal prosecutions it is the duty of the prosecuting counsel to put the evidence before the court with a single eye towards the doing of justice and not for the purpose of securing a conviction.<sup>19</sup>

[7.1.10] It will be appreciated that there is a stark disparity between these different views. This disparity provides another illustration of the ongoing tension between the roles of the prosecutor as a minister of justice and an adversarial advocate.

[7.1.11] The debate as to the extent of the prosecutorial duty in calling witnesses continues because there remain considerable tactical advantages that may accrue to an accused from requiring the prosecution to call or tender all material witnesses at trial. The inclusion of a witness “on the back of the indictment” by the prosecution is ordinarily taken as a firm signal, both as to the nature of the prosecution case and the fact that that witness is to be called by the prosecution at trial. Though there is “no property in a witness,” as Sprack notes, “It would be wrong for defence solicitors to speak to a witness on the back of the indictment prior to trial as that could be construed as interfering with the prosecution case.”<sup>20</sup> There may also be sound tactical reasons for the defence to prefer the prosecution to call a witness. It is often easier to cross-examine a witness than to examine them.<sup>21</sup> Cross-examination can afford greater scope for points to be made that will advance the case of the cross-examining advocate while at the same time diminishing the opportunity for their case to be undermined. This consideration can be especially pertinent when the proposed witness is likely to prove unreliable or to turn “hostile” at trial.<sup>22</sup> There is also the argument that defence lawyers, many of whom operate on tight budgets in a publicly funded service, lack the means or resources<sup>23</sup> or even the inclination<sup>24</sup> to contact potential witnesses, to obtain a proof of evidence and to arrange

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<sup>17</sup> (2007) 81 ALJR 1309 at 1325 quoting *R v Ratten* (1974) 131 CLR 510 at 517 per Barwick CJ.

<sup>18</sup> *R v Ratten* (1974) 131 CLR 510 at 517 per Barwick CJ.

<sup>19</sup> (1936) 100 JPN 553.

<sup>20</sup> Sprack, Ch 1, n 65, 285.

<sup>21</sup> See, for example, *R v Mita* [1996] 1 NZLR 95 at 96. See further the discussion in Part 7 of Chapter 10.

<sup>22</sup> The case of *R v Roberts* (1984) 80 Cr App R 89 is a perfect example of this situation. Calling such a dubious witness can all too easily backfire on the party calling them and there are considerable restrictions then in impugning the credibility of the witness by the party calling them. At common law a party can only impugn a witness called by them after the trial judge has declared that witness “hostile.” This is far from guaranteed. These restrictions have been considerably eased in the *Uniform Evidence Act* jurisdictions in Australia by s 38. See further the discussion in Part 10 of Chapter 10 at [10.10.11].

<sup>23</sup> See the references and discussion at Chapter 6, n 232. See also [6.10.2]-[6.10.3].

<sup>24</sup> See Chapter 6, n 230. See also [6.10.2].

and secure their attendance at trial. Such defence efforts remain reliant upon the efforts of the prosecution.

[7.1.12] In *R v Haringey Justices, ex parte DPP*<sup>25</sup> Stuart Smith LJ discussed the two broad classes of witnesses that the prosecution may be reluctant to call at trial. The first, and perhaps most obvious comprise “those whose evidence is helpful to the defence and tends to contradict the Crown case.”<sup>26</sup> Not only will such witnesses prove likely to hinder or undermine the prosecution case, but traditionally there are also considerable restraints on the prosecutor in attacking or impugning the credibility of a witness it has called. As Hobhouse LJ in a 1994 case<sup>27</sup> explained:

In a situation such as this it is clear that unless the prosecution choose to treat one of their witnesses as hostile, and they have to have make the appropriate application at the appropriate stage of the trial if they are to do so, and, what is more, make out the basis for that application, the prosecution must accept the credit of the witnesses whom they have called and placed before the jury.<sup>28</sup>

[7.1.13] However, the category of witnesses the prosecution may be reluctant to call is not confined to those witnesses who obviously undermine its case. This second category of witnesses, according to Stuart-Smith LJ, constitutes those witnesses whose evidence assists the prosecution case, but for whatever reason, the prosecutor might choose not to call. In the ordinary course of events, as one would expect, the defence would not wish or insist on such witnesses being called. But, as noted by Stuart Smith LJ, “there may be exceptional cases where the defence do wish such a witness to be called.”<sup>29</sup> Sprack suggests:

...it does not follow that because a witness is on the back of the indictment, and thus *prima facie* favourable to the prosecution, that the defence will necessarily be pleased if he is not called. It may be that part of the witness’ anticipated evidence will support the accused’s case, or that the defence hope through skilled cross-examination so as to undermine the witness’ testimony that doubt will be cast on the entire prosecution case. In such a case the defence would feel aggrieved if the prosecution did not call the witness.<sup>30</sup>

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<sup>25</sup> *R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828. See further Part 9 of Chapter 9.

<sup>26</sup> [1996] 1 All ER 828 at 833. In contrast, as a tactical issue, the defence might also desire the opportunity to cross-examine a witness “fundamentally sympathetic” to their cause, see *R v Goncalves* (1997) 99 A Crim R 193 at 216.

<sup>27</sup> *R v Pacey*, *The Times*, 3 March 1994 (otherwise unreported); Court of Appeal, 21 February 1994, No. 92/6419/X2, 21, Official Transcript.

<sup>28</sup> Transcript, 14-15. In *Pacey* the crucial prosecution witness at a murder trial had departed from her original account. She had not been declared hostile. The prosecutor in his final speech was about to cast doubt upon the credit of that witness “but before he had even made that point he was stopped by the judge on the objection of the defence.” *Ibid*, 14. The Court of Appeal expressed its agreement with the trial judge’s prompt intervention.

<sup>29</sup> [1996] 1 All ER 828 at 833.

<sup>30</sup> Sprack, Ch 1, n 65, 285.

[7.1.14] It might seem logical in an adversarial criminal process that the prosecution would be free to ignore such defence wishes and deploy only those witnesses that would have the effect of presenting the prosecution case in its strongest and most favourable light. While the notion that the prosecution should have an entirely unfettered discretion in its choice of witnesses at trial and be free to call only those witnesses who support its case accords with an adversarial conception of the prosecutor’s role, it is necessarily inconsistent with the conception of the prosecutor as a minister of justice. The “adversarial” approach of Diplock LJ and Mr. Const crucially neglects the premise that the prosecutor as a minister of justice, as opposed to a partisan advocate, owes a paramount duty to seek justice and promote the truth.<sup>31</sup> This over-riding duty has been extended, as will be seen, in both England<sup>32</sup> and Australia<sup>33</sup> to the prosecution’s decision as to which witnesses to call at trial. Present practice in both England and Australia establishes that the prosecution is precluded, ostensibly at least, from having regard to purely adversarial considerations in deciding how to present its case at trial. A prosecuting lawyer cannot ignore his or her role as a minister of justice and may be expected to call witnesses who may not necessarily advance his or her own case and may even benefit the defence case. What could be regarded on a purely adversarial basis as a simple decision (that is the prosecution need only call those witnesses who will best serve its cause) is subject to considerations of “fairness” arising from the prosecutor’s status as a minister of justice.

[7.1.15] There is clearly a tension between the roles of the prosecutor as a minister of justice and an adversarial advocate in deciding how to prove the prosecution case. In both Australia and England various practices have been prescribed and various responsibilities cast on prosecutors which seek to influence the prosecutorial decision as to calling witnesses. As with the disclosure of unused material it is my argument that with regard to the calling of witnesses the ongoing tension between the differing prosecutorial roles of minister of justice and adversarial advocate has proved problematic. What Justice Shepherd described as “the vexed question of when and in what circumstances a prosecutor is bound to call a witness”<sup>34</sup> has never been entirely resolved. The courts in both England and Australia have on occasion either sought to reconcile these two prosecutorial roles or have tended to favour one prosecutorial role at the expense of the other. Though both England and Australia share a similar historical background in relation to the role of the prosecutor in calling witnesses at trial, in recent years there has emerged a subtle but significant divergence between the principles evolved in England and Australia in confronting this issue.

[7.1.16] My argument is that the longstanding inconsistencies in judicial approach between the prosecutor’s “minister of justice” and adversarial roles in calling witnesses reflects the wider tension between these conflicting prosecutorial roles. The historical authorities in support of the minister of justice role in this area are explicable as a manifestation of the judicial desire in the 1800s to level the unequal playing field

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<sup>31</sup> See, for example, *R v McCullough* [1982] Tas R 43 at 58-59.

<sup>32</sup> See, for example, *R v Russell-Jones* [1995] 3 All ER 239 at 243-244 and *State v Grant* [2007] 1 AC 1 at 16.

<sup>33</sup> See, for example, *R v Lucas* [1973] VR 693 at 696-697 per Smith ACJ and 705 per Newton J and Norris AJ and *R v Whitehorn* (1983) 152 CLR 657 at 663-664 per Deane J and 674-675 per Dawson J.

<sup>34</sup> Shepherd, I, “Court Witnesses – A Desirable or Undesirable Encroachment on the Adversary System” (1982) 56 ALJ 234 at 242.

between the prosecution and defence. The historical authorities in support of the prosecutor’s adversarial role in calling witnesses appear to signify, even in the 1800s, an acceptance that the developing adversarial system of criminal justice required the prosecution to have a broad discretion in its choice of witnesses as befitted its role as an active player in an adversarial criminal trial. The minister of justice role was ultimately rejected by the historical authorities and it is my argument that the modern authorities that have subscribed to this view are not only misconceived but have misapplied the relevant law. The minister of justice role also fails to reflect the adversarial nature of the criminal process or take account of the implications of recent developments in the prosecution’s duty of disclosure as outlined in Chapter 5.

## Part 2 Historical Development: Early Tensions

[7.2.1] This Part traces the early development of the prosecution’s “duty” in calling witnesses and the tension in prosecutorial roles manifest from the outset in this task. During the 1700s, as was discussed in Chapter 2, the typical English criminal trial bore few of the adversarial trademarks that characterise the criminal trial of today. It was essentially an inquisitorial affair and the bulk of prosecutions were brought, not by a public prosecutor, but by or on behalf of the victim. Private prosecutions were the norm. At common law the responsibility for producing the evidence to be employed at trial and securing the attendance of witnesses was borne by the prosecutor alone, whether he or she was acting in a public or private capacity.<sup>35</sup> Given that the accused lacked the formal entitlement to be legally represented<sup>36</sup> and rarely was in practice, it is unsurprising that the prosecution had the task of producing any witnesses to be called at trial. Neither the typical accused nor the courts were in a position to arrange the attendance of the witnesses to be called. However, there does not seem to have been any doctrine, minister of justice or otherwise, at this time that confined the discretion of the prosecution in its choice of witnesses at trial.<sup>37</sup>

[7.2.2] During the period when the criminal trial evolved from an inquisitorial to an adversarial process the first reported cases appear in England that dealt with the prosecutor’s responsibility in calling witnesses at trial. It is unlikely to be a coincidence that at about the same time as the view was gaining currency that the prosecutorial role was as a minister of justice that there should also emerge the connected notion that in calling witnesses at trial the prosecution might be subject to some wider obligation or duty than merely using their best efforts to secure the conviction of an accused person.

[7.2.3] Despite its increasingly adversarial flavour, the criminal process of the 1800s was not a contest of equals.<sup>38</sup> The accused, especially when viewed in a modern light, was in a

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<sup>35</sup> Shapray, Ch 1, n 21, 130. However, one should not overlook the role of the Magistrate who until the statutory reforms of the 1800s functioned in an inquisitorial role and was involved closely in and often responsible for, the investigation and preparation of the case for trial.

<sup>36</sup> See the discussion in Part 6 of Chapter 2.

<sup>37</sup> See Landsman, Ch 2, n 28, 531-533. Hay also notes that the private prosecutor had “much influence” in deciding what witnesses to take before either the magistrate for the preliminary examination or the grand jury, see Hay (1983), Ch 2, n 146, 168. Hay highlights the wide powers of the private prosecutor, see *Ibid*, 168-170.

<sup>38</sup> See May, Ch 2, n 33, 200 and Bentley, Ch 2, n 158, 297-301. See further Chapter 2, n 328.

position of comparative powerlessness. This background is of particular relevance in considering the question of the prosecutor’s choice of the witnesses to be called at trial. Though there were many aspects of the criminal process that disadvantaged the typical defendant,<sup>39</sup> the “fundamental defect” of the period according to Hostettler was the lack of any mechanism to ensure that the whole of the evidence that was available in a case was brought in the interests of justice before a court for its attention and consideration.<sup>40</sup> Beattie describes how the criminal process of the period placed “severe limitations on the ability of the accused to prepare for trial.”<sup>41</sup> Most defendants were not legally represented and had to speak entirely for themselves.<sup>42</sup> There existed no widespread publicly funded provision for legal representation to an accused person. It was routine for an accused to be remanded in custody in conditions that were “appalling”<sup>43</sup> until his or her trial.<sup>44</sup> The accused would be committed for trial without knowing until the trial the precise nature of the charge as it would appear on the indictment.<sup>45</sup> The accused until 1836 had no access to the depositions of the prosecution witnesses and would have only known the evidence against him or her as it unfolded at trial.<sup>46</sup> Disclosure of what is now known as unused material was virtually unheard of.<sup>47</sup> Many accused persons were illiterate and from the bottom levels of society and would necessarily have lacked either the ability or the means to locate their own witnesses and to arrange and ensure the attendance of any witnesses at trial they might wish to call.<sup>48</sup> The result of all this to the typical accused was profound. “Unrepresented defendants, incarcerated in Newgate, were seldom able to track down eyewitnesses or alibis.”<sup>49</sup> As an English commentator in 1865 explained:

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<sup>39</sup> See further the discussion in Part 5 of Chapter 2.

<sup>40</sup> Hostettler (1992), Ch 2, n 121, 148. See the previous discussion of this issue in Part 5 of Chapter 2.

<sup>41</sup> Beattie, Ch 2, n 28, 223. See further *Ibid*, 222-223, Stephen, Ch 2, n 3, 356-357 and Langbein (1994), Ch 2, n 48, 1057-1058.

<sup>42</sup> Beattie, Ch 2, n 28, 222. Hostettler’s argues that even the development of an adversarial system and the expansion in the presence and role of defence counsel at trial did not overcome the “fundamental defect” of the lack of any means of ensuring that all the possible evidence was brought before the court, see Hostettler (1992), Ch 2, n 121, 148. See further the discussion in Part 10 of Chapter 2.

<sup>43</sup> Langbein (1994), Ch 2, n 48, 1057. See further *Ibid*, 1057, n 47.

<sup>44</sup> Beattie, Ch 2, n 28, 222-223.

<sup>45</sup> See *Ibid*, 223 and Langbein (1994), Ch 2, n 48, 1058. Prior notice of the indictment was of great benefit to an accused given the availability of “technical” defences about the contents and particulars of the indictment, see further *Ibid*, 1058, n 49 and n 50 and the discussion in Chapter 2, n 170.

<sup>46</sup> See the discussion in Part 2 of Chapter 5 at [5.2.2].

<sup>47</sup> See the discussion in Part 2 of Chapter 5.

<sup>48</sup> See the complaints of the three defendants in *R v White & Ors* [1828] NSWSupC 79 (*The Australian*, 17 September 1828) who were not only unrepresented at their trial on a capital count of cattle stealing but had been unable to subpoena the witnesses for their defence on account of their lack of means and being remanded in custody prior to the trial. See the similar complaints in *R v Halloran & Waldron* [1834] NSWSupC 85 (*Sydney Gazette*, 7 August 1834) (unrepresented accused charged with stealing 150 sheep), *R v Flanders* (*Mercury*, 5 June 1862) (unrepresented accused charged with murder) and *R v Leathley* (*Mercury*, 25 January 1866) (unrepresented accused charged with murder).

<sup>49</sup> May, Ch 2, n 33, 108.

... in criminal procedure, ie. in cases of felony, the accused is under the enormous disadvantage that he is at once placed in custody, and thus deprived of the immense advantage of personal liberty, in seeing his witnesses, getting up his case, and the like, all of which advantages are all enjoyed by the prosecutor. No one can over-estimate the importance of this to an innocent person, especially if he is unable to afford good professional assistance.<sup>50</sup>

[7.2.4] The course and outcome of any trial was therefore heavily reliant upon the witnesses the prosecutor would call at trial. Given the circumstances of the criminal process of the 1800s it is unsurprising that the view gained support that the prosecutor, as a minister of justice and not as a partisan advocate, should be expected to alleviate the unenviable position of the accused and to call any material witnesses, whether those witnesses helped or hindered the prosecution case. Under the notion of the prosecutor’s role as a minister of justice, even a witness named on the back of the indictment whose account was unhelpful to the prosecution cause was required to be called by the prosecutor at trial. However, even in the late 1700s or the 1800s, this view was not universally held. The jurisprudence on this issue has proved to be, as was noted by Shapray with some understatement, “not completely consistent.”<sup>51</sup>

[7.2.5] The tension between the prosecutor’s conflicting adversary and minister of justice roles is starkly illustrated by the early cases that considered the prosecutor’s choice of the witnesses to be called at trial. From the outset there is a clear conflict between those cases that subscribed to a minister of justice approach in the calling of witnesses and those cases that reflected the adversarial reality of the criminal process and allowed the prosecution a wide discretion as to their choice of witnesses. Indeed, “it may truly be said that signs of the ancient conflict can still be found”<sup>52</sup> to the present day.

[7.2.6] The first reported case that dealt with this issue was *R v Oldroyd*<sup>53</sup> in 1805. This can, perhaps, be regarded as the earliest instance, reported at least, of the prosecutor’s minister of justice role in the calling of witnesses.<sup>54</sup> The accused had been convicted of the murder of his father. The mother of the accused was named on the “back of the indictment” and had been examined before the grand jury. Prosecution counsel indicated at the end of his case that he did not intend to call the mother as “strong suspicion” had fallen upon her as an accomplice to the murder.<sup>55</sup> He was clearly justified in thinking that the mother would prove an unreliable and potentially hostile witness. Nonetheless, the trial judge, Graham B, considered it “right” and in “compliance with the usual practice” as

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<sup>50</sup> This astute observation was offered by the report writer to *R v Berens* (1865) 4 F & F 483, n (b).

<sup>51</sup> Shapray, Ch 1, n 21, 130.

<sup>52</sup> See *R v Mullan (No 2)* [1980] NIJB 10; Court of Appeal of Northern Ireland, 7 October 1980, Transcript.

<sup>53</sup> (1805) Russ & Ry 88.

<sup>54</sup> It has been suggested that the genesis of the purported rule that the prosecution should call any material witnesses at trial can be found in *R v Seneviratne* [1936] 3 All ER 36, see *R v Grant* [2007] 4 WWR 543 at [19]-[20]. However, it is clear that this rule predates 1936 and can be traced back to at least the early 1800s with cases such as *Oldroyd*.

<sup>55</sup> (1805) Russ & Ry 88.

she was named on the indictment for her to be called as a witness, apparently by the prosecution.<sup>56</sup> This was duly done.<sup>57</sup>

[7.2.7] In contrast in the case of *R v Burdett*<sup>58</sup> in 1820 where the issue was whether it was appropriate to expect the prosecution to call a “professional friend” of the accused in relation to a central issue in dispute at the trial, the court rejected the contention that the prosecution ought to have called the friend. It was considered unrealistic to expect the prosecution to call someone so clearly identified with the “camp” of the accused. As Best J remarked, “The law does not impose impossibilities on parties; it expects that a man who has the means of knowing who may be witnesses, shall call them.”<sup>59</sup>

[7.2.8] It is significant, given the later development of the law to note that *Burdett* rather than *Oldroyd* would appear to represent the stronger view of the prevailing practice of the time. Landsman notes that the handful of cases mentioned in the Old Bailey Session Papers that dealt with this issue appear to have sanctioned a broad degree of discretion in prosecution counsel in his selection of witnesses at trial and rejected any duty that restricted the scope of that discretion.<sup>60</sup> It was accepted that the prosecution were entitled to refuse to call a relevant witness, even if that witness was named on the back of the indictment.<sup>61</sup> This point emerges from *R v Wilson*<sup>62</sup> in 1796. Here defence counsel protested that he thought it “not candid” for the prosecution to “withhold” from calling the accomplice named on the back of the indictment as the defence wished to make use of him.<sup>63</sup> The witness could have given evidence of a different description to that adduced by the prosecution at trial. The trial judge refused to find fault with Mr. Const’s adversarial concept of the prosecutorial role in calling witnesses and commented that “when there are counsel they know best whether their case is proved, and I leave it to them.”<sup>64</sup> *Wilson* is an important decision. It is an early recognition that prosecution counsel in the emerging adversarial trial should have the freedom to present the prosecution case as he deemed fit. Const’s refusal to call the witness and the judge’s apparent endorsement of it, as Landsman notes, “cede[d] almost total control of the

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<sup>56</sup> (1805) Russ & Ry 88.

<sup>57</sup> The mother, unsurprisingly, gave evidence in her son’s favour. But as this differed from her deposition to the grand jury, Graham B directed the jury that no weight was to be attached to her evidence. The son was convicted.

<sup>58</sup> (1820) 4 B & Ald 95. This case was still been relied upon by McHugh J as recently as 2001 and 2002 in relation to when an adverse inference could be drawn from the failure of an accused to give or call evidence, see *R v Azzopardi* (2001) 205 CLR 50 at 83 and *R v Dyers* (2002) 210 CLR 285 at 300.

<sup>59</sup> (1820) 4 B & Ald 95 at 123. If this simple maxim had been observed, the subsequent development of the law, especially in Australia since 1981, would have proved a great deal more straightforward. See further the discussion in Chapter 8.

<sup>60</sup> See Landsman, Ch 2, n 28, 531-533.

<sup>61</sup> *Ibid.* See also *R v Whiteway*, Central Criminal Court, 24 October 1787, No 17871024-19.

<sup>62</sup> Central Criminal Court, 30 November 1796, No T17961130-42.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* Though the trial judge proceeded to call the witness himself. This practice was relatively common in the 1800s. It was employed in *R v Simmonds* (1823) 1 Car & P 84 and *R v Bodle* (1833) 6 Car & P 186. It is possible the judicial willingness to call witnesses is a “hangover” from the inquisitorial nature of the criminal process in the 1700s that continued into the 1800s, see the discussion in Part 3 of Chapter 2. The ability of the judge to call a witness has been greatly confined by more recent cases, see the references in Chapter 8, n 108.



evidentiary process to partisan counsel whose objective was to present the most persuasive and consistent case.”<sup>65</sup>

[7.2.9] However, even in the Old Bailey Session Papers for this period the conflict between the minister of justice and adversarial roles in calling witnesses is manifest. In *R v Cunningham*<sup>66</sup> in 1797 Mr. Const, only weeks after his strong comments in *Wilson* in support of the prosecutor’s adversarial role, expressed his equally strong support for the minister of justice role:

...it is in fairness upon this occasion when the investigation of the truth is the only object to be obtained, that all those who have already given any information should be called [by the prosecution], that those whose duty is to defend the prisoner (and here he will be very ably defended) may have an opportunity of examining them. I shall therefore call them...<sup>67</sup>

[7.2.10] The tension in prosecutorial roles in calling witnesses emerges in similar clear terms from three cases in 1823. In *R v Simmonds*<sup>68</sup> during a theft trial prosecution counsel declined to call a particular witness who was named on the back of the indictment. The trial judge, Hullock B, observed that though prosecution counsel was not bound to call every witness named on the back of the indictment, “it is usual for him to do so: and if he does not, I, as judge will call the witness, that the prisoner’s counsel may have an opportunity of cross-examining him.”<sup>69</sup>

[7.2.11] However, a footnote to the report of *Simmonds* describes two further cases heard in the summer of 1823 that suggests that this approach was not universally followed. In the first of these cases, *R v Whitbread*,<sup>70</sup> the accused had been charged with theft from his employer who had brought the prosecution. Prosecution counsel omitted at trial to call an apprentice who had himself been implicated in the theft. It is likely given this that the apprentice was viewed as an unreliable witness. The apprentice had been examined before the grand jury and was named on the back of the indictment. Defence counsel argued that the prosecutor should call him. The prosecutor refused to do so and said that the defence could call him if they wished. The trial judges, Holroyd and Burrough JJ,<sup>71</sup> stated that the prosecutor was not obliged to call every witness named on the back of the indictment merely to afford the other party the opportunity to cross-examine them. The apprentice was not called. This case stands in contrast to *R v Taylor*,<sup>72</sup> the second case cited in the footnote, where Park J insisted on prosecution counsel calling all the witnesses named on the back of the indictment in order that the defence might cross-examine them. This included witnesses whom the prosecutor had not wished to call.

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<sup>65</sup> Landsman, Ch 2, n 28, 559. See further *Ibid*, 533-535.

<sup>66</sup> Central Criminal Court, 11 January 1797, No 17970111-5.

<sup>67</sup> *R v Cunningham*, Central Criminal Court, 11 January 1797, No 17970111-5.

<sup>68</sup> (1823) 1 Car & P 84. *Simmonds* has been cited as the first authority on the prosecutor’s discretion in calling witnesses, see *R v Lemay* [1952] 1 SCR 232 at 246 per Locke J.

<sup>69</sup> (1823) 1 Car & P 84.

<sup>70</sup> (1823) 1 Car & P 84, n (a).

<sup>71</sup> It was not unusual in the 1800s for there to be two judges to conduct a criminal trial.

<sup>72</sup> (1823) 1 Car & P 84, n (a).

[7.2.12] It is notable that these three reported cases, all decided at about the same time, arrived at such different views as to the proper role of the prosecutor in calling witnesses. Such an inconsistency in approach was to be a recurring theme of the nineteenth century authorities and beyond. This inconsistency reflects the ongoing tension between the differing roles of the prosecutor which was noted by the author of the 1823 footnote:

It seems more conducive to the discovery of truth, to call everyone who has ever been a witness in the case, than to allow the prosecutor to select his witnesses, and keep back anyone whom he considers unfavourable to his prosecution. As to the prisoner’s counsel calling them, in general he would be very unwise to risk as his witness, any man who has ever been thought of as a witness in support of the prosecution.<sup>73</sup>

### **Part 3: The Minister of Justice Role Applied: “For the Furtherance of Justice”**

[7.3.1] The cases in England in the quarter of a century after *Simmonds* largely, though by no means universally, adhered to the minister of justice view.<sup>74</sup> The extent of the prosecutor’s duties as a minister of justice in this area was highlighted by cases involving felonies such as *R v Holden*<sup>75</sup> in 1838, *R v Bull*<sup>76</sup> in 1839, *R v Carpenter*<sup>77</sup> in 1844 and *R v Stroner*<sup>78</sup> in 1845. These cases show not only the strength and extent of the proposition that the prosecutor should call any material witness regardless of their value to the prosecution case in different situations but also provide some rationale for the existence of that duty. In brief these cases illustrate that the courts of the period saw their role, not simply to convict the guilty,<sup>79</sup> but also to promote the fairness of the proceedings by seeking to ameliorate the fact that the accused was effectively prevented from locating witnesses and preparing his or her defence.<sup>80</sup>

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<sup>73</sup> (1823) 1 Car & P 84, n (a).

<sup>74</sup> This role was applied in various situations. See *R v Beezley* (1830) 4 Car & P 220 (the prosecution was compelled to call four witnesses who had been named on the back of the indictment to give the defence the opportunity to cross-examine them though the prosecutor, foreshadowing a later common practice, merely tendered the witnesses for the purpose of cross-examination); *R v Chapman* (1838) 8 Car & P 558 (the brother of the accused had been present at scene of the alleged crime and was named on the back of the indictment and both the prosecutor and judge discounted the concern of the grand jury as to the inclusion of such a witness who might be thought to be biased towards the defence); *R v Orchard & Orchard* (1838) 8 Car & P 559, n B and 568 (during a murder trial Lord Abinger CB was critical of the failure of prosecution counsel to call two eyewitnesses despite their likely partiality to the defence and remarked on this failure in his charge to the jury in that if they had been called they may have provided important evidence) and *R v Bodle* (1833) 6 Car & P 186 (Gasalee J and Vaughan B allowed the father of the accused during a murder trial who had been named on the back of the indictment to be called after the prosecutor had refused to call him in order that the defence might cross examine him about anything material to its case. The father had provided different accounts as to the circumstances of the crime and the defence wished to raise in cross-examination the suspicion that the father had committed the crime himself).

<sup>75</sup> (1838) 8 Car & P 606.

<sup>76</sup> (1839) 9 Car & P 22.

<sup>77</sup> (1844) 1 Cox CC 72.

<sup>78</sup> (1845) 1 Car & Kir 650.

<sup>79</sup> See the discussion in Part 4 of Chapter 2 at [2.4.7]-[2.4.8].

<sup>80</sup> Langbein (1994), Ch 2, n 48, 1057-1058.

[7.3.2] In *Holden*, for example, the accused had been charged with the murder of his brother after a quarrel. The families of both the deceased and the accused had shared a house. The wife and the nine year-old daughter of the deceased had been present during the fatal quarrel. At trial the prosecutor called the wife and several witnesses who had not been present during the quarrel. The trial judge, Patteson J, raised the position of the nine year-old daughter of the deceased. She had continued to reside at the house with the family of the accused after the death of her father and had even come to the court with the prisoner’s witnesses. She was not named on the back of the indictment. The prosecutor intimated that he did not intend to call the daughter.<sup>81</sup> Patteson J disagreed:

She ought to be called. She was present at the transaction. Every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusions as to the *real truth of the matter* [my emphasis].<sup>82</sup>

[7.3.3] Three surgeons had examined the body of the deceased and there was a difference of opinion as the cause of death. Two of the surgeons were named on the back of the indictment and were called by the prosecutor. The third was not. Patteson J queried why the third surgeon had not been called. He was present in court, seemingly as a spectator. It was pointed out that the third surgeon had not been named on the back of the indictment. Patterson J again made his views clear:

I am aware of that; but as he is in court I shall insist on him being examined. He is a material witness who is not called on the part of the prosecution, and as he is in court, I shall call him for the *furtherance of justice* [my emphasis].<sup>83</sup>

[7.3.4] The result of the intervention of Patteson J was that both the daughter of the deceased and the third surgeon were called to give evidence. The accused was found not guilty.<sup>84</sup>

[7.3.5] In *R v Bull*<sup>85</sup> in 1839 the accused had been charged with manslaughter. The issue was self-defence. The prosecutor wished not to rely at trial upon a witness who had been examined before the grand jury and whose name was on the back of the indictment. The prosecutor had received information touching this witness since committal. The defence counsel objected and submitted that it was unfair for the prosecutor to hold back any such witness.<sup>86</sup> Both the prosecution and defence relied upon unreported cases heard by Patteson J.<sup>87</sup> The trial judge, Vaughan J, upheld the defence objection. He commented:

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<sup>81</sup> The prosecutor’s reluctance could have been due to the daughter’s young age and her apparent identification with the cause of her uncle.

<sup>82</sup> (1838) 8 Car & P 606 at 609-610.

<sup>83</sup> (1838) 8 Car & P 606 at 610.

<sup>84</sup> It is a matter of speculation as to whether this verdict may have been influenced by the robust intervention of the trial judge in the prosecution’s choice of witnesses.

<sup>85</sup> (1839) 9 Car & P 22.

<sup>86</sup> There would have been would have been sound tactical considerations for the defence to insist on the prosecution calling the witness in preference to calling the witness themselves. Apart from the greater scope permitted by cross-examination had the defence called any witness other than the accused then the criminal procedure of the time in England would have resulted in the prosecution and not the defence having the right to

It is the proper course to put the witness in the box. I think that every witness ought to be examined. In cases of this kind counsel ought not keep back a witness, because his evidence may weaken the case for the prosecution. *Our only object here is to discover the truth* [my emphasis].<sup>88</sup>

[7.3.6] The witness was duly called by the prosecutor. He was only briefly examined by the prosecutor and was cross-examined at length by the defence during which certain discrepancies emerged with the evidence of the other prosecution witnesses. The accused was, nevertheless, convicted.<sup>89</sup>

[7.3.7] In *R v Carpenter*<sup>90</sup> in 1844, the accused had been indicted for rape. Several witnesses had given depositions before the committing magistrates and had been “boundover”<sup>91</sup> to appear and give evidence for the prosecution. They did not go before the grand jury and their names therefore did not appear on the back of the indictment. This would have resulted in them not giving evidence for the prosecution at trial. Alderson B was unimpressed. His Lordship echoed the importance of the prosecutorial role of a minister of justice in ensuring that all material testimony, even if supporting the accused, was presented to the jury:

This practice must not be allowed. Every witness whose depositions are taken by the magistrate, and who is under recognizances to appear, should go before the grand jury, and the name should be indorsed on the bill. *Otherwise, great injustice may be done to prisoners* [my emphasis]. A prisoner relies upon certain witnesses being produced by the prosecution, and whose depositions he is entitled to. He has a right to their testimony, if it tells in his favour.<sup>92</sup>

[7.3.8] Confronted with such a pronouncement as to his obligation in calling witnesses prosecution counsel in *Carpenter* argued that if such a rule were to be enforced he would frequently find himself in the unsatisfactory position of having to produce hostile or unwilling witnesses as part of the prosecution case and that he would be without power to contradict their testimony. Alderson B was unmoved:

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the crucial last address to the jury before the trial judge’s summing up. This was a very real consideration for defence counsel, see Cairns, Ch 2, n 43, 107-108. See further the discussion in Part 8 of Chapter 10.

<sup>87</sup> This shows that, as will be discussed in this Chapter, the practice was not uniform.

<sup>88</sup> (1839) 9 Car & P 22 at 23.

<sup>89</sup> Though it is notable that the jury attached a strong recommendation of mercy to their verdict.

<sup>90</sup> (1844) 1 Cox CC 72.

<sup>91</sup> To use the expression of the period. This is similar to the modern rule that a “fully bound” witness is required to give “live” evidence at trial. Prosecution counsel had (and indeed still does to the present day) a range of options open to him at trial. He could have called the witness as part of the Crown case, he could have called or “tendered” (as the expression is often used) the witness as a Crown witness without asking him any questions in order to afford defence counsel an opportunity to cross examine him (this would have also preserved the important right of last address to the jury for defence counsel) or the prosecution could have secured (presumably by means of a subpoena if required) the witness’s attendance at trial (as he had been named on the back of the indictment) for the defence to call had they wished (though the defence would have been constrained in their examination-in-chief and would have lost any right to cross-examine the witness unless he or she was declared hostile).

<sup>92</sup> (1844) 1 Cox CC 72.

No. In such a case your duty will be to put the witness into the box. If you do not examine him, it will be competent to the prisoner to cross-examine; and upon that I should permit you to re-examine and contradict him.<sup>93</sup>

[7.3.9] The 1845 case of *R v Stroner*<sup>94</sup> further demonstrates the extent of the obligation that could be imposed on the prosecution to call all material witnesses at trial regardless of their allegiance or benefit to the prosecution case. The accused in this case had been charged with the rape of a servant. The victim asserted that she had almost immediately after the alleged offence complained to her employer’s wife, a Mrs. Smith. The victim explained that she had shown Mrs. Smith some blood in the cowshed where the offence was said to have taken place (the unsympathetic response of Mrs. Smith had been to say “Pooh!”). The victim stated that her bloodstained clothing had been washed the next day by a woman named Chatwood. Neither Mrs. Smith nor Chatwood were named on the back of the indictment. Both were in attendance at court as intended witnesses for the defence. The trial judge, Pollock LCB, stated that both women must be called by prosecution counsel but that he would be accorded “every latitude”<sup>95</sup> in his examination of them. In giving evidence as a prosecution witness, Mrs. Smith denied that the victim had ever made any complaint to her and had not shown her blood anywhere. At Pollock LCB’s suggestion the prosecution was abandoned at this point.

[7.3.10] It appears that the minister of justice approach to the calling of witnesses was not restricted to felonies. In the 1839 case of *R v Vincent*<sup>96</sup> Alderson B was called upon to consider whether any duty of the prosecutor in the calling of witnesses extended beyond felonies. The accused had faced various misdemeanour charges in relation to taking part in unlawful assemblies. The defence asked at the conclusion of the prosecution case for a witness, who had not been called, but whose name was on the back of the indictment, to be called so that he might be cross-examined by the defence. The prosecutor initially demurred as the accused did not face a felony. Alderson B remarked as to the appropriate practice:

The calling of a witness, whose name is on the back of the indictment for the [other] side to cross-examine him, is by no means of course. It is a discretion, even in a felony, but is a discretion always exercised, and I think it may well be exercised in a misdemeanour.<sup>97</sup>

In light of this indication from Alderson B the prosecutor withdrew his objection and the witness was duly tendered by him in order to be cross-examined by the defence.<sup>98</sup>

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<sup>93</sup> (1844) 1 Cox CC 72. Alderson B was evidently referring to the common law rule that permits a party calling a witness to cross-examine its own witness. But the common law only allowed this if the witness was “hostile.” It is unclear from Alderson B’s observation whether he was confirming or casting doubt upon this approach.

<sup>94</sup> (1845) 1 Car & Kir 650.

<sup>95</sup> (1845) 1 Car & Kir 650 at 651.

<sup>96</sup> (1839) 9 Car & P 91.

<sup>97</sup> (1839) 9 Car & P 91 at 106.

<sup>98</sup> See also *R v Gillam* (*The Times*, 11 April 1828); *R v Ryan & Ors* [1836] NSWSupC 25 (*Sydney Herald*, 9 May 1836); *R v Hill & McKay* [1841] TASSupC 18 (*Hobart Town Advertiser*, 30 April 1841); *R v Mercer* (*Colonial Times*, 7 June 1842); *R v Bogle* [1842] TASSupC 32 (*True Colonist*, 16 December 1842) and *R v Sparks & Campbell* (*Hobart Town Courier*, 4 August 1843, p 4; *Hobart Town Advertiser*, 28 July 1843 and *Colonial Times*,

[7.3.11] However, the case of *R v Barley*<sup>99</sup> in 1847 illustrates the uncertainty that could arise in practice. In *Barley* prosecution counsel challenged the applicability of the minister of justice role in his choice of witnesses at trial. He indicated that he did not wish to call two witnesses who had been named on the back of the indictment. The defence objected and “begged” that the prosecutor call them in order that the defence could cross-examine them. The prosecutor was unmoved and stated that he was not bound to call them. He commented that if the defence wished to elicit anything then they must call them at trial as defence witnesses. The prosecutor argued that listing a witness on the back of the indictment did not require them to be called as a prosecution witness. “All that it amounted to was a notice to the prisoner that such parties were in attendance, and that if the prisoner chose to do so, he might secure the benefit of their testimony as part of his own case.”<sup>100</sup> According to prosecution counsel Alderson B had expressed this very view in an unreported case.<sup>101</sup> Defence counsel responded that despite the apparent unreported view of Alderson B, “The universal practice in this and all other places where the criminal law is administered, as at the Old Bailey, is the reverse.”<sup>102</sup> Pollock CB was initially inclined to agree with the prosecutor’s contention but having “consulted” with Coleridge J changed his view and indicated that the two witnesses should, in fact, be called by the prosecutor. The hesitation shown by Pollock CB is illustrative of the uncertainties in judicial approach as to the prosecutorial role in calling witnesses during this period.<sup>103</sup>

[7.3.12] However, the broad thrust of the early authorities, with the notable exception of *Whitbread, Wilson* and perhaps *Burdett*,<sup>104</sup> does seem relatively clear. The prosecution had to have regard to wider considerations as made clear in *Bull, Holden* and *Carpenter*. As the “furtherance of justice”<sup>105</sup> and not securing the conviction of the accused was the paramount objective of the proceedings it was not legitimate for a prosecutor to have regard purely to adversarial considerations in his choice of the witnesses to call at trial. The prosecutor was under an apparent duty to call at trial those witnesses named on the back of the indictment, or at the very least to call and tender them to the defence for the

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1 August 1843, p 3) at trials with both legally represented and unrepresented defendants where prosecution counsel called, seemingly as matter of course, witnesses purely for them to be cross-examined by the defence. Though the practice of “tendering” a witness for the purpose of cross-examination was frowned upon in later Australian cases such as *R v Foley* (1984) 13 A Crim R 29 and *R v Kormornick* [1986] VR 845 it is difficult to understand the basis for such misgivings. This practice is common and has been approved in many modern cases, see *R v Fuller* [1966] NZLR 865 at 868, *R v Whitehorn* (1983) 152 CLR 657 at 664 per Deane J and *R v Apostilides* (1984) 154 CLR 563 at 576.

<sup>99</sup> (1847) 2 Cox CC 191.

<sup>100</sup> (1847) 2 Cox CC 191.

<sup>101</sup> This is obviously not the view that Alderson B had expressed in either *Carpenter* or *Vincent*.

<sup>102</sup> (1847) 2 Cox CC 191.

<sup>103</sup> This uncertainty is similar to the very differing views of Mr Const noted earlier in Part 2 of this Chapter.

<sup>104</sup> See also *R v Thacker & Ringrose* in 1847 (the same year as *Barley*) at the Central Criminal Court (not formally reported but discussed in *R v Edwards, Underwood & Edwards* (1848) 3 Cox CC 82 at 83) where the prosecutor was willing to call a witness named on the indictment at the insistence of the defence but the trial judges held that the prosecutor was not bound to call the witness and that it was an issue for the prisoner’s counsel to call him or not. See similarly *R v Flatley* (1842) Ir Cir Pep 445 and *R v Belaney* (1844) 20 CCC Sess P 441.

<sup>105</sup> *R v Holden* (1838) 6 Car & P 606 at 610.

purpose of cross-examination. If the prosecutor should decline to call such a witness then the trial judge might either direct the prosecutor to call the witness<sup>106</sup> or call the witness himself<sup>107</sup> (it is sometimes unclear from the reports as to which step was actually taken). The prosecutor might even find himself compelled to call a witness who was not named on the indictment. The fact that a witness might be unhelpful to the prosecution case, partial to the accused or in the defence “camp” was not an obstacle to the expectation that he or she would be called by the prosecution.

[7.3.13] These early authorities must be considered against the backdrop of the criminal process existing at the time where an accused had a very limited entitlement to disclosure of the evidence against him or her<sup>108</sup> and laboured under difficulties in preparing his or her own defence and arranging and securing the attendance at trial of witnesses who might assist his or her case. It was in order to redress this imbalance that these early authorities imposed such a strict obligation upon the prosecutor to produce and call all witnesses named on the back of the indictment, even those who might be hostile or damaging to the prosecution case and who were not named on the back of the indictment. It was a means for the accused to be made aware of the evidence in the case and to gain the attendance and testimony at trial of any material witness. It would appear that the prosecutorial role in calling witnesses was an expression or extension of the wider development during the early 1800s that the prosecutor was not to act as the partisan advocate striving for the conviction of the accused.

[7.3.14] However, even during this period it was acknowledged that the prosecution was not under any “duty” as such to call all the material witnesses at trial, whatever the common practice in England may have been. The prosecutorial discretion was not as constrained as some of the early authorities might have suggested. As Sir John Jarvis noted in 1846:

It must be observed ...that it is no objection that witnesses are called and examined at the trial, whose names are not on the back of the indictment; and that *in strictness it is not necessary for the prosecution to call every witness whose name is on the back of the indictment* [my emphasis], although it is usual to do so, in order that the defendant may have the benefit of cross examination.<sup>109</sup>

#### **Part 4: The Adversarial Role Applied: The Minister of Justice Role Discarded?**

[7.4.1] The cases to 1847 are not without interest. However, their persuasive value in the development of the law is ultimately questionable. This point was explained by Parke B in

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<sup>106</sup> See, for example, as in *R v Beezley* (1830) 4 Car & P 220, *R v Bull* (1839) 9 Car & P 22 and *R v Barley* (1847) 2 Cox CC 191. Such a “power” is denied by modern authorities, see Chapter 8, n 105.

<sup>107</sup> See, for example, *R v Simmonds* (1823) 1 Car & P 84 and *R v Bodle* (1833) 6 Car & P 186. Such an active view of the judicial role reflects the inquisitorial nature of the typical criminal trial until the early 1800s.

<sup>108</sup> See *R v Holland* (1792) 4 TR 691. See further the discussion in Part 2 of Chapter 5.

<sup>109</sup> Jervis, J, *Archbold's Summary of the Law Relating to Pleading and Evidence in Criminal Cases* (New York, Banks, Gould & Co, 1846) p 77. Jervis's views command particular respect. He was the author of the landmark Act of 1847 that placed committal proceedings on a modern judicial footing.

*R v Cassidy*<sup>110</sup> in 1858. Parke B acknowledged that “certainly the usual course”<sup>111</sup> was for the prosecutor to call any witnesses named on the back of the indictment and, failing that, the witness would be called so that the defence might cross-examine him or her. However, this practice rested on an unsteady foundation. Parke B noted that the practice did not stand upon any clear or correct principle and was supported only on the authority of single judges at criminal trials. Also, despite defence counsel’s assurance in *Barley* that this was the “universal practice” that was followed, it was clear that there had been marked inconsistencies in approach. Not only did different judges take different positions on this issue but the same judge, such as Alderson B, might well express different views on different occasions.<sup>112</sup> This lack of uniformity was remarked upon in 1965 in *R v Olivia*<sup>113</sup> when Lord Parker CJ observed that “the practice varied between individual judges, and a time apparently came in 1847 when the judges, or a number of them, met and laid down what for the future was to be the practice.”<sup>114</sup>

[7.4.2] Therefore, when the issue arose directly in *R v Woodhead*<sup>115</sup> in December 1847 it was not entirely surprising that the court did not regard itself as constrained by the preceding cases. At the outset of the trial, prosecution counsel commented that he did not consider it necessary to call all the witnesses whose names were listed on the back of the indictment unless the defence should desire otherwise. At this point Alderson B intervened and remarked:

You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on you [the prosecutor] bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in court, but *they are to be called by the party who wants their evidence. This is the only sensible rule* [my emphasis].<sup>116</sup>

[7.4.3] At this point a presumably perplexed defence counsel asked whether if he called such persons that would make them his own witnesses. Alderson B was clear in reply:

Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that

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<sup>110</sup> (1858) 1 F & F 79.

<sup>111</sup> (1858) 1 F & F 79.

<sup>112</sup> The view expressed by Alderson B in *Carpenter* and *Vincent* should be compared with the view attributed to him by prosecution counsel in *Barley* and his later comments in *R v Woodhead* (1847) 2 Car & Kir 520.

<sup>113</sup> [1965] 3 All ER 116. This is the first “modern” English authority on this issue. See further the discussion in Part 2 of Chapter 9.

<sup>114</sup> [1965] 3 All ER 116 at 119.

<sup>115</sup> (1847) 2 Car & Kir 520.

<sup>116</sup> (1847) 2 Car & Kir 520.



he ought not to give evidence to show them unworthy of credit, however falsely the witnesses might have deposed.<sup>117</sup>

[7.4.4] It has been suggested that *Woodhead* merely “clarified” the previous law.<sup>118</sup> However, it is clear that the comments of Alderson B extend beyond mere “clarification” and that *Woodhead* represented a major departure from the minister of justice role in calling witnesses that had been adopted by the majority of the previous reported authorities. Alderson B indicated that the judges in England had arrived at a joint position concerning the practice to be followed. They were obviously seeking to avoid the previous inconsistencies and arrive at a uniform practice. Alderson B’s opinion had undergone a major change since his previous comments in *Vincent* and *Carpenter*. The view of the law that had been advanced without success by prosecution counsel in *Barley*, only the previous year, had now been explicitly adopted. *Woodhead* conferred considerable discretion on the prosecutor in the calling of witnesses and allowed the prosecutor the flexibility to decline to call witnesses deemed unhelpful or unnecessary to his or her case. If the prosecutor chose not to call a witness on the back of the indictment the defence could not insist on that witness being called by the prosecutor and it was an issue for the defence whether they wished to call the person or not. *Woodhead* was a pivotal decision and represents a major shift towards the adoption of an “adversarial” conception of the prosecutor’s role in the presentation of the prosecution case. “The only sensible rule” as Alderson B had observed was that the party that wished a particular witness to be called at trial, should call that witness.

[7.4.5] This “adversarial” view was also adopted in March 1848 by Erle J at the Central Criminal Court in *R v Edwards and Others*.<sup>119</sup> The prisoners had been charged with forgery and the prosecution closed his case without having called all the witnesses named on the indictment. Defence counsel relied on the pre-*Woodhead* line of authority, particularly *R v Holden* (*Woodhead* is not mentioned in the report), and submitted that it was the duty of the prosecutor to call all the named witnesses so that the defence might have an opportunity to cross-examine them. Prosecution counsel, a Mr. Clarkson, opposed this submission and relying upon an unreported case from July 1847,<sup>120</sup> argued that it was a matter for the discretion of the prosecution as to whether any particular witness should be called by the prosecution or not. Erle J agreed with the prosecutor:

My own impression is clear, and I believe a majority of the judges have distinctly decided that the counsel for the prosecution is not bound to call all witnesses at the back of the bill. He is a minister of public justice, and he is called upon to lay such facts before the jury as he thinks the interests of justice demand... If Mr. Clarkson tells me that he does not think that justice would be advanced by his calling the witness, I cannot interfere.<sup>121</sup>

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<sup>117</sup> (1847) 2 Car & Kir 520-521.

<sup>118</sup> *R v Lemay* [1952] 1 SCR 232 at 248 per Locke J. See the extensive review conducted by Locke J of the historical decisions [1952] 1 SCR 232 at 252-256. See further the discussion in Part 3 of Chapter 10.

<sup>119</sup> (1848) 3 Cox CC 82.

<sup>120</sup> *R v Thacker and Ringrose*, see above n 104.

<sup>121</sup> (1848) 3 Cox CC 82 at 83.

[7.4.6] His Lordship was fortified in reaching this conclusion by recalling a “remarkable case of murder”<sup>122</sup> that he had defended when practising at the Bar. In that case the prosecutor had declined to call several witnesses who were named on the back of the indictment. Erle J recalled that it had been most material for the defence that they should not be obliged to call them. The trial judges had stoutly resisted every effort of Mr. Erle (as he then obviously was) to interfere with the discretion of the prosecutor. In the end the witnesses had to be called by the defence.<sup>123</sup>

[7.4.7] If the prosecution could not be compelled to call the witnesses in *Edwards* then the defence submitted that Erle J should exercise his own undoubted discretion and call the witnesses in question. Erle J was altogether more cautious than the judges had been in some of the previous authorities and refused to call the witnesses himself. It was inappropriate for him to intervene:

There are, no doubt, cases in which a judge might think it a matter of justice so to interfere; but, generally speaking, we ought to be careful not to overrule the discretion of counsel, who are, of course, more fully aware of the facts of the case than we can be.<sup>124</sup>

[7.4.8] Erle J did acknowledge that the prosecution did not enjoy a completely free hand in the calling of witnesses. Prosecution counsel was still required to function as a “minister of public justice.”<sup>125</sup> However, Erle J rejected any notion that the prosecutor was therefore required to call all the witnesses named on the back of the indictment. He seemingly recognised that in an adversarial system prosecution counsel should have the latitude to conduct the prosecution case as they deemed fit and that a judge should be loathe to intervene in that process.

[7.4.9] It might have been thought that the explicit and considered decisions in both *Woodhead* and *Edwards* would have put to rest any notion that the prosecutor as a minister of justice was required to call all the witnesses named on the indictment. Any such confidence soon proved to be misplaced. In the Irish decision of *R v Farrell and Moore*<sup>126</sup> in 1848, the two defendants had been acquitted of receiving stolen property that had been taken in a robbery after the prosecution had proved unable to confirm that the items found in the possession of the two defendants were in fact the stolen items. The prosecutor, a court official called the clerk to the crown,<sup>127</sup> explained that he had not

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<sup>122</sup> (1848) 3 Cox CC 82 at 83. The case recalled by Erle J is noted as *R v Belaney* (1844) 20 CCC Sess P 441. Though no other details of this case are provided in the report of *Edwards*, the Court of Appeal in *R v Roberts* (1984) 80 Cr App R 89 at 96 described as “interesting” the case recalled by Erle J and the refusal of the trial judges there to interfere with the prosecution’s choice of its witnesses.

<sup>123</sup> The position taken by the trial judges in *R v Belaney* (1844) 20 CCC Sess P 441 further illustrates the recurring inconsistencies in judicial approach taken during the period between *Simmonds* and *Woodhead*.

<sup>124</sup> (1848) 3 Cox CC 82 at 83. See also *R v Wiggins* (1867) 10 Cox CC 562 where Lush J refused to call a witness at a murder trial who had provided a deposition at the inquest but had not been called by the prosecution. The accused was convicted and hanged.

<sup>125</sup> (1848) 3 Cox CC 82 at 83. It is unclear in *Edwards* whether the prosecution had the witnesses they had discarded in attendance in case the defence wished to call them. *Woodhead* had suggested that they should.

<sup>126</sup> (1848) 3 Cox CC 139. Irish decisions during this period are significant as the common law of Ireland was declared to be that of England, see *R v Duffy, O’Connell & Ors* (1843) 1 Cox CC 386 at 394.

<sup>127</sup> The victim had failed to engage counsel which had resulted in the clerk to the crown, with apparent reluctance, having to act as the prosecutor.

called one material witness who had been examined before the grand jury and who had been named on the indictment. This witness had been involved in the robbery and presumably could have confirmed that the recovered items were the stolen items. The prosecutor justified his omission on the basis that he had been unwilling to have prejudiced the two prisoners. This does seem to be taking the role of the prosecutor as even a minister of justice to excessive lengths.<sup>128</sup> One of the trial judges, Pennefather B, was unimpressed by the prosecutor’s conduct. Not only had there been “great negligence somewhere”<sup>129</sup> in the omission of the witness but furthermore:

...it was very wrong not to have called him, and examined him at trial. It is the duty of the clerk of the crown, where counsel are not employed to prosecute, to conduct the prosecution generally; and examine the witnesses; and where the names are on the back of the bill, it is his duty, it is incumbent on him to call them; it is not only due to the public, but also due to the prisoner, that every one produced before the grand jury should be called.<sup>130</sup>

[7.4.10] This pronouncement runs counter to the decisions in both *Woodhead* and *Edwards*.<sup>131</sup> It would seem that the prosecutor’s precise role in the calling of witnesses continued to remain unresolved.

[7.4.11] The issue arose again in 1858 in *R v Cassidy*.<sup>132</sup> In this case prosecution counsel had refused the defence request to call a witness who was named on the back of the indictment. Parke B acknowledged that there had been a rule of practice that compelled the prosecution to call any such witness,<sup>133</sup> but he considered that he was not bound by the prior authorities that had applied this practice and he was therefore free to follow what he considered to be the correct principle. The prosecution were at liberty to call what witnesses they thought proper. The step of examining certain witnesses before the magistrate at committal and including their names on the back of the indictment did not require them to be called by the prosecutor at trial. Rather to Parke B the prosecutor only “impliedly undertook”<sup>134</sup> to have those named witnesses in court so that that the defence might call them if they wished. The defence might refrain from making their own arrangements to call the witness if they had seen that witness included on the indictment. Though the prosecutor should have a witness so named at court he was under no

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<sup>128</sup> As was discussed in Parts 4 and 7 of Chapter 2 in the 1800s in England prosecutions were generally brought by the victim and it was not unusual for the victim to fail to secure legal representation to conduct a prosecution. This resulted in a court official or even the trial judge being placed in the unsatisfactory position of having to act as the prosecutor. As in the present case the quality of such prosecutions was often very questionable, see the reference by Pennefather B (1838) 3 Cox CC 139 at 140. The criminal law of the period was not always wholly stacked against the accused, see further the discussion in Part 5 of Chapter 2.

<sup>129</sup> (1838) 3 Cox CC 139.

<sup>130</sup> (1838) 3 Cox CC 139 at 140.

<sup>131</sup> Interestingly, the author of the report in *R v Farrell & Moore* observed that *Barley*, *Carpenter* and *Holden* all spoke of the necessity of the prosecutor calling all the witnesses named on the indictment but *Edwards* stated the opposite, see (1848) 3 Cox CC 140, n (a). Oddly, no mention was made of *Woodhead*.

<sup>132</sup> (1858) 1 F & F 79.

<sup>133</sup> See the previous discussion in Part 3 of this Chapter.

<sup>134</sup> (1858) 1 F & F 79.

compulsion to call that witness.<sup>135</sup> The prosecutor was free to take his own course with regards to the calling of witnesses. A similar view had been expressed by both Campbell CJ and Cresswell J.<sup>136</sup> The prosecution were at liberty not to call the witness named on the back of the indictment and if the defendant chose to call him, then the witness must be considered a defence witness as much as those subpoenaed and called by the defence.<sup>137</sup>

[7.4.12] Despite the accumulating authority of *Woodhead*, *Edwards* and *Cassidy* the defence again sought to insist on the prosecution calling a witness in the 1876 case of *R v Thompson*.<sup>138</sup> The accused had been charged with the murder of his wife. The victim had told a doctor prior to her death that the injuries that had ultimately led to her death had been caused by her husband. However, the victim had also told a nurse that her injuries had being caused accidentally by her falling down a flight of stairs. Both the doctor and the nurse had been before the grand jury and were named on the back of the indictment. The prosecutor did not propose to call either as witnesses. The defence was keen to adduce the evidence of the nurse and contended that the prosecution were bound to call her. Lush J disagreed and held that the prosecution were not bound to call either the nurse or the doctor or any other witness for that matter because their name happened to be on the indictment although he would “have pressed them to do so in a case of this nature.”<sup>139</sup>

[7.4.13] The majority of the early cases preceding *Woodhead* and *Farrell and Moore* support a prosecutorial obligation to call all the witnesses named on the back of the indictment. Indeed on occasion this duty was held to extend to all material witnesses to the transaction, regardless of whether the witnesses were even named on the indictment and their testimony advanced or undermined the prosecution cause. Such a duty was said to derive from the prosecutor’s position as a minister of justice whose purpose was to achieve justice. As had been observed by Vaughan J, “Our only object here is to discover the truth.”<sup>140</sup> This prosecutorial role as a minister of justice in the selection of witnesses carried weight within the emerging adversarial criminal process of the first half 1800s of the 1800s when the disadvantaged position of the accused meant that in practice he or

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<sup>135</sup> See *R v Cavanagh & Shaw* [1972] 2 All ER 704. This duty is not absolute but requires the prosecution to take all reasonable steps to secure the attendance of a witness named on the back of the indictment. See also *R v Garner* [1958] Crim LR 827 for an application of the duty on the prosecution to still produce witnesses it is not proposing to call.

<sup>136</sup> The cases(s) in which such a view had been expressed by Campbell CJ and Cresswell J were not cited.

<sup>137</sup> Though Parke B reached a similar conclusion to that of Alderson B in *Woodhead*, it is perhaps surprising that no mention of *Woodhead* is made in the arguments or judgment in *Cassidy*. It is intriguing that the report writer in *Cassidy* at a footnote refers to *Woodhead* as having previously decided the point but comments that that decision did not appear to be widely known, see (1858) 1 F & F 80, n (a).

<sup>138</sup> (1876) 13 Cox CC 181.

<sup>139</sup> (1876) 13 Cox CC 181 at 182. The judge noted that if the nurse were called, the prosecution would be entitled in rebuttal to adduce evidence of the statement from the victim to the doctor. The defence decided that discretion was advisable in such circumstances and neither witness was called.

<sup>140</sup> *R v Bull* (1839) 9 Car & P 22 at 23.

she had little ability to prepare his or her defence and was heavily reliant upon the prosecution calling witnesses who might support his or her defence.

[7.4.14] However, the minister of justice line of authority ultimately is, as was noted by Parke B in *Cassidy*, of little persuasive value and it must be treated as overtaken by cases such as *Woodhead*, *Edwards*, *Cassidy* and *Thompson*. These cases represent a formidable and considered strand of authority. The pre-*Woodhead* authorities and *Farrell and Moore* are explicable when one considers the state of criminal procedure existing at the time and can be seen as a judicial means of seeking to redress the perceived imbalance in the positions of the accused and prosecution by informing him or her of the prosecution case and ensuring that any material witnesses were produced to give evidence at trial. However, the line of authority from *Simmonds* to 1847 and *Farrell and Moore* cannot stand with *Woodhead* and the subsequent decisions. I would suggest that the two strands of authority are impossible, to reconcile. Writing in 1896 an Irish commentator<sup>141</sup> considered the various formulations that had been expressed as to the prosecution’s role in calling witnesses. Whatever the early cases may have stated, the effect of cases such as *Woodhead*, *Cassidy* and *Thompson* was plain.<sup>142</sup> The author noted:

the rule is now clear that prosecuting counsel has a discretion as to which of the witnesses on the back of the indictment he will call, but must have all in attendance to give the defence an opportunity of calling them.<sup>143</sup>

[7.4.15] It is a matter of speculation but it may be that with both the increasingly adversarial nature of the criminal process by the mid 1800s<sup>144</sup> and the concurrent improvements in the position of the accused within that process, the courts recognised that the original minister of justice rationale in requiring the prosecution to call all witnesses at trial regardless of their value to the prosecution case had diminished. Shapray observes that “with the developments of considerations which afforded protection to the defendant, the trial took on a more adversarial character and the prosecutor was allowed greater selectivity in presenting his case.”<sup>145</sup> This view is persuasive. By the middle part of the 1800s, the accused was entitled to the depositions of the prosecution witnesses taken at committal and to be fully represented by counsel in both the committal proceedings and at the trial. The lawyers increasingly dominated the course of the criminal trial. In such an adversarial process (even though there was still far from complete equality in the positions of the accused and prosecution) it was logical for the prosecution to possess a broad discretion in its selection of witnesses providing it made available at trial for the defence to call, as had happened in *Woodhead*, any witness named on the back of the indictment it was not proposing to call. The minister of justice rationale evident in cases such as *Cunningham*, *Stroner* and *Carpenter* had been diminished by developments in the criminal process.

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<sup>141</sup> (1896) 30 Ir Law Times 395.

<sup>142</sup> The cases of *R v Wilson* (see above n 11) and *R v Edwards & Ors* (1848) 3 Cox CC 82 should be added to these.

<sup>143</sup> (1896) 30 Ir Law Times 395 at 396.

<sup>144</sup> It has been asserted that with such landmark criminal trials as *Courvoisier* in 1840 and *Palmer* in 1856 the transformation from an inquisitorial process to a modern adversarial system was complete. See further the discussion in Part 4 of Chapter 2 and especially Chapter 2, n 136 and n 137.

<sup>145</sup> Shapray, Ch 1, n 21, 130.

## Part 5: The Minister of Justice Restated: Renewed Inconsistency

[7.5.1] Whilst the rule may have appeared clear, consistency in this area remained frustratingly elusive as emerged in two subsequent cases, *R v Holland*<sup>146</sup> in 1896 and *R v Harris*<sup>147</sup> in 1927. These cases, notwithstanding the *Woodhead* and *Edwards* line of authority, insisted that the prosecution must apply a minister of justice role to its choice of witnesses at trial. Despite *Woodhead* the dilemma of the precise role to be adopted by the prosecutor in calling witnesses at trial remained.

[7.5.2] In the Irish case of *Holland* the accused had been charged with “attempting to outrage” a twelve year-old girl. The trial judge, Wright J, asked why two women who had been in the house at the relevant time had not been called by the prosecution to give evidence at trial. Prosecution counsel observed that neither witness had been named on the indictment or had given evidence at committal. Wright J rejected this explanation and held that both women should have been called by the prosecution at both the committal and the trial. It was the duty of the prosecutor to present all information to the court and it did not matter whether such evidence went to the guilt or the innocence of the accused. Indeed, if it went to the innocence of the accused that was all the more reason for the prosecution to have adduced it. In this case Wright J indicated that “common fairness”<sup>148</sup> dictated that the prosecutor should call everyone who was in a position to throw any light on the circumstances existing at the time of the alleged offence and on the character of the victim herself.<sup>149</sup> The prosecutor submitted that there was no duty cast upon the prosecution to call witnesses for the defence and Wright J’s scope of prosecutorial responsibility did not accord with settled practice.<sup>150</sup>

[7.5.3] Wright J remained insistent on “the absolute necessity”<sup>151</sup> of the prosecutor calling all material witnesses. Indeed, Wright J would not even admit to the exception of the prosecutor’s entitlement to refuse to call a witness who it was believed would give false evidence.<sup>152</sup> The first woman was called and the result of her evidence during cross-examination seems to have been such that the jury were in disagreement and at Wright J’s suggestion eventually brought in a verdict of not guilty.

[7.5.4] *Holland* can be regarded as the “high water mark” of the minister of justice approach to the prosecution’s calling of witnesses. Though the accused in *Holland* may have benefited from the intervention of the trial judge, I would suggest that the view

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<sup>146</sup> (1896) 30 Ir Law Times 395.

<sup>147</sup> [1927] 2 KB 587.

<sup>148</sup> (1896) 30 Ir Law Times 395.

<sup>149</sup> One would hope that in a modern case such evidence would be rightly dismissed as irrelevant.

<sup>150</sup> Prosecution counsel’s submission correctly reflected the law as it existed in 1896.

<sup>151</sup> (1896) 30 Ir Law Times 395.

<sup>152</sup> This exception remains in both England and Australia. In *R v Lawson* in an influential passage Sholl J observed that the prosecution were not required to call even a vital witness where the prosecutor reasonably thought that witness to be “dishonest or absurd or grossly unreliable or quite untruthful” [1960] VR 37 at 40. See also *R v Oliva* [1965] 3 All ER 116. The extent of this exception has been confined in Australia in recent cases, see *R v Kneebone* (1999) 47 NSWLR 450 and *R v Jensen* [2009] VSCA 266. See further the discussion in Part 6 of Chapter 8.

taken by Wright J disregards both the formidable *Woodhead* strand of authority and the established adversarial nature of the typical criminal trial by 1896. If a prosecutor possessed a discretion as to the calling of a witness named on the back of the indictment, then it is difficult to see how he could be compelled to call a witness who was not even named on the indictment. I would submit that *Holland* represents an unwarranted, and in practice unworkable, application and, indeed, extension of the notion of the prosecutor as a minister of justice in the calling of witnesses. As the report writer in *Holland* remarked, “The effect of his ruling being that the prosecuting counsel must not in any case be a judge of the evidence.”<sup>153</sup> In other words prosecution counsel would have to call any relevant witness regardless of their value to the prosecution case or their reliability. The proposition of Wright J would result effectively, as stated by prosecution counsel in *Holland*,<sup>154</sup> in the prosecutor doing the work of the defence and calling witnesses for the defence. This concern was dismissed by the author of the report in *Holland*, who observed, “But this objection is more theoretical than practical, and is altogether outweighed by the importance of discovering the truth where serious offences have been committed.”<sup>155</sup>

[7.5.5] I would contend that such an endorsement of the minister of justice concept of the prosecutorial role of calling witnesses is problematic and pays insufficient regard to the adversarial character of the criminal process. The objection to the prosecutor being expected to do the task of the defence and call defence witnesses in an adversarial criminal justice system is an eminently practical one.

[7.5.6] *Holland* can be criticised as it appears ill considered and is at odds with the *Woodhead* line of authority. However, it is not possible to so easily dismiss the persuasive value of *R v Harris* in 1927. The main issue in *Harris* was the correctness of the trial judge’s decision to call as a witness a co-defendant who had already pleaded guilty.<sup>156</sup> However, in the course of legal argument the following observation from Lord Hewart CJ was reported:

In civil cases the dispute is between the parties and the judge merely keeps the ring, and the parties need not call hostile witnesses, but in criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury.<sup>157</sup>

[7.5.7] The breadth of this proposition is obvious. An English commentator in 1936 remarked as to the “the very wide terms” of the duty that would therefore be imposed upon the prosecution and noted that Lord Hewart’s observation had “by no means met

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<sup>153</sup> (1896) 30 Ir Law Times 395 at 396.

<sup>154</sup> As later echoed by Diplock LJ in *Dallison v Caffery* [1964] 2 All ER 610 at 622, see above n 15.

<sup>155</sup> (1896) 30 Ir Law Times 395 at 396.

<sup>156</sup> The Court of Appeal held that the judge had been wrong to call the witness himself. It was “irregular and calculated to cause injustice” to the prisoner [1927] 2 KB 587 at 595. Though a judge had power to call a witness himself at trial “if in his opinion this course of action is necessary in the interests of justice,” the Court of Appeal emphasised that this was a power to be only sparingly exercised [1927] 2 KB 587 at 595. See also *R v Liddle* (1928) 21 Cr App R 3 and *R v MacMahon* (1933) 24 Cr App R 95. See further Chapter 8, n 108.

<sup>157</sup> [1927] 2 KB 587 at 590.

universal approval.”<sup>158</sup> The extent of the duty cast upon by the prosecution by Lord Hewart accords with the minister of justice role advanced by Wright J in *Holland* and later by Humphreys J in *Treacy*. However, it must be borne in mind that the observation of Lord Hewart CJ was clearly an interlocutory comment that was purely *obiter* as it did not directly bear upon the main issue under consideration by the Court of Appeal. But, even *obiter* remarks expressed during the course of legal argument by a Lord Chief Justice of England cannot be lightly ignored. As Hawke J in *R v Nicholson*<sup>159</sup> at Nottingham Assizes in the summer of 1936, when confronted with Lord Hewart’s statement, commented:

...he would be a bold man indeed who would disregard the result of any decision in which the Lord Chief Justice’s mind had been brought to the facts of the particular matter he was deciding.<sup>160</sup>

## Part 6: A Possible Solution to the Problem of Who Calls what Witness

[7.6.1] The reason for the re-emergence of the minister of justice role in the calling of witnesses in *Holland* and *Harris* is unclear. Given the renewed conflict between the cases supporting the adversarial role and those supporting the minister of justice role, *Nicholson* is an important but often overlooked decision. It not only deals with the prosecution’s obligation in the calling of witnesses but it also deals with the connected issue of disclosure of material held by the prosecution.<sup>161</sup> Nicholson was charged with incest with his eight year-old daughter. One doctor had examined the victim, her clothing and the clothing of the accused and had, unhelpfully for the accused, found spermatozoa upon them.<sup>162</sup> This doctor was named on the indictment and was to be called as a prosecution witness at trial. Certain samples that had been unwittingly compromised were submitted for a second examination by an expert witness. This second examination yielded negative results. The prosecution had made the defence aware of the evidence of this second witness. Indeed, at the insistence of the defence they even brought him to court at public expense. The defence contended, nevertheless, that this witness should be called by the prosecutor at trial. The prosecutor disagreed and asserted that it was solely an issue for the defence if they wished to call the second witness as a defence witness. The prosecution did not wish to call him.<sup>163</sup>

[7.6.2] The trial judge, Hawke J, noted the comments of Lord Hewart in *Harris* but considered that it did not apply to the present case. His Lordship accepted that it was plain that prosecutions in England had to be “conducted with absolute fairness”<sup>164</sup> but held that such fairness did not extend to compelling the prosecutor in this case to call the second witness. Hawke J was heavily influenced in reaching this conclusion by the fact

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<sup>158</sup> Editor, “Crown Prosecutions – Duty to Make all Evidence Available” (1936) 100 JPN 553.

<sup>159</sup> See *Ibid* where the decision, which is not formally reported, is discussed and quoted at length.

<sup>160</sup> *Ibid*.

<sup>161</sup> See further the previous discussions in Chapter 5 at [5.4.3].

<sup>162</sup> The report quaintly describes this evidence as “little entities,” *Ibid*.

<sup>163</sup> This reluctance is unsurprising as the evidence of this witness undermined the incriminating findings of the first doctor.

<sup>164</sup> (1936) 100 JPN 553.



that the defence was fully aware of the evidence of the second witness and could have called him if they so wished. The reasoning of Hawke J merits repetition in full:

The prosecution not only supplied the defence with all this information, but they have at the cost to the taxpayer brought that witness here. I do not propose to force the prosecution to call him. I think that the people in charge of prosecutions must to some extent exercise their own discretion as to whom they should call, and I think that the true limit to it is that they may use their discretion, but that they must give the defence the whole of the information they have got in their hands in case the defence should desire to use it, and so that no unfairness should be visited upon a defendant. Under those circumstances, I do not propose to insist upon the prosecution calling this witness.<sup>165</sup>

[7.6.3] This decision and the reasoning of Hawke J will be considered further in Chapter 10. However, at this stage, I would suggest that *Nicholson* is highly significant in two respects. First, it affirms that the prosecutor possesses considerable discretion as to whom they call as witnesses and rejects the notion that as a minister of justice or otherwise the prosecution is bound to call any material witness, regardless of his or her value to the prosecution case. Secondly, it recognises the close nexus between the issues of prosecution disclosure of unused material and any decision as to calling witnesses through insisting that the prosecution furnish the necessary information to the defence to enable them to reach a proper decision as to calling a witness who has been discounted by the prosecution. Such a link may appear obvious but it has been often overlooked.<sup>166</sup> *Nicholson*, as will be argued in Chapter 10, provides a fair and practical solution as to the dilemma of who should call what witness.

### Part 7: *R v Seneviratne*: A Recipe for Confusion?

[7.7.1] At about the same time as the decision in *Nicholson*, the Privy Council in *R v Seneviratne*<sup>167</sup> in July 1936 was also called upon to confront the ongoing issue of what was the appropriate role of the prosecutor in calling witnesses at trial. The facts of this case read like a script from an Agatha Christie novel. The accused was a Cambridge graduate who had been admitted as a barrister in England. He had been convicted in Ceylon on a majority verdict of the murder through the use of chloroform of his wife, a lady of “short stature” and “huge” size.<sup>168</sup> On the facts of the case as recited by Lord Roche, delivering the judgment of the Privy Council, it is surprising that the accused had been convicted of the murder. The evidence of various servants, if accepted, as to the movements of the accused would have rendered it impossible for him to have committed the crime. The deceased had more than once threatened to take her own life and there was “particularly strong evidence pointing to a tendency or inclination on the part of the lady to commit suicide.”<sup>169</sup> The medical evidence as to the wife’s cause of death was

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<sup>165</sup> *Ibid.*

<sup>166</sup> This issue will be addressed in Chapter 10, especially with reference to *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437.

<sup>167</sup> [1936] 3 All ER 36.

<sup>168</sup> [1936] 3 All ER 36 at 39. Though the Privy Council commented specifically on these unflattering details of the deceased, I must confess their precise significance escapes me.

<sup>169</sup> [1936] 3 All ER 36 at 46. It was clear that the marriage had been volatile.

“completely ambiguous” in the view of Lord Roche.<sup>170</sup> Though the medical witnesses agreed that the wife had died due to an administration of chloroform it was unclear whether this was as a result of murder, suicide or accident. There was “no preponderance of opinion among the doctors”<sup>171</sup> that established, or even pointed clearly towards, murder. The victim’s own doctor, a Dr Paul, appeared to have leaned firmly against foul play. Lord Roche further stated that any theory about the cause of death must have regard to the evidence of the wife’s maid, Alpina, which further undermined<sup>172</sup> the prosecution case and afforded some support to the notion that the wife may have administered the chloroform to herself. Given this paucity of evidence, the Privy Council quashed the conviction on the basis that the only verdict that had been open to the jury was one of not guilty.

[7.7.2] However, at trial the prosecution had called all 54 witnesses who were named on the back of the indictment. These included all available eyewitnesses and even various witnesses who were specifically named as defence witnesses. This extraordinary gesture on the part of the prosecutor was in pursuance of a local practice that stated that it was incumbent upon the prosecutor to call all available eyewitnesses, even if they were potential defence witnesses. The upshot of this was that the prosecutor called Dr Paul, the maid Alpina, the servants who supported the effective alibi of the accused and various other servants who tended to support the defence case.<sup>173</sup>

[7.7.3] *Seneviratne* illustrates the ongoing tension between the roles of the prosecutor as both a minister of justice in presenting all the relevant evidence whether it assisted the prosecution or not and his or her role as an advocate in an adversarial system who had a legitimate interest in the outcome of the trial and who should therefore be free to present the prosecution case as he or she saw fit. The judgment of Lord Roche proved unable to reconcile the inconsistency between these roles and, far from reducing any such inconsistency, actually had the effect of contributing materially to its continuation.

[7.7.4] Lord Roche first noted that it was undesirable that the prosecution should have felt constrained to call numerous defence witnesses as part of its case. He observed:

Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more

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<sup>170</sup> [1936] 3 All ER 36 at 47.

<sup>171</sup> [1936] 3 All ER 36 at 47.

<sup>172</sup> The timing was such that it would have been “extraordinary” that the defendant would have been able to have killed his wife [1936] 3 All ER 36 at 43.

<sup>173</sup> One can imagine the jury’s bafflement at the prosecution calling as part of their case such a host of defence witnesses. This sense of bafflement would have only been heightened as the prosecution at the trial had proceeded to cross-examine the servants about prior inconsistent accounts that they had given (which went only to credit and were not admissible as to the truth of their contents) and to show that they could have been easily induced to try to exonerate their employer. It is unsurprising that the Privy Council pronounced this aspect of the trial as “unhappy” [1936] 3 All ER 36 at 49.

likely than to result if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination.<sup>174</sup>

[7.7.5] This aspect of Lord Roche’s judgment appears to give endorsement to an adversarial conception of the prosecutor’s role in calling witnesses. Given the infinite variety of circumstances that might arise, Lord Roche accepted that it was unwise to offer any firm guidance to prosecutors in this area. Though prosecutors were encouraged to act with candour and fairness in the discharge of their functions, it was recognised that prosecutors should be free to present the prosecution case as the particular circumstances demanded. It was accepted that the prosecutor was not expected to perform the function of the defence and that the prosecution were entitled to refrain from calling witnesses deemed either unreliable or unnecessary to their case. However, the next portion of Lord Roche’s speech is less clear. Lord Roche observed, immediately following on from the passage quoted above, that:

Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. Thus, in the present case, the maid Alpina and Dr S C Paul were indispensable Crown witnesses. As to some of the other witnesses, there might have been less confusion and a fairer trial if, though their names were on the indictment, they had been put into the box to be questioned as to other than formal matters by the defending counsel.<sup>175</sup>

[7.7.6] This passage appears to conflict with the earlier portion quoted above. Despite his earlier exhortation Lord Roche was apparently unable to resist the temptation to offer some advice to the prosecution about what witnesses it should call at trial. Both Alpina and Dr Paul may have been unhelpful to the prosecution case but it was, nevertheless, essential that they be called as prosecution witnesses on account of their importance to the issues in the trial. Lord Roche did acknowledge that the evidence of the various servants who could have been deemed repetitive or peripheral could have been more effectively left to be called by the defence than by the prosecution. The prosecutor was also entitled to avoid calling witnesses whose evidence might serve only to confuse the jury. It has been suggested, not wholly persuasively in my view, that the second part of Lord Roche’s speech was not intended to offer any general advice to prosecutors as to whom they should call at trial and that the second portion needs to be considered in light of the particular facts and context of the case, namely a defence complaint as to the excessive number of witnesses called by the prosecutor at *Seneviratne*’s trial and not the more usual complaint that the prosecutor had declined to call relevant witnesses.<sup>176</sup> Aronson suggests that Lord Roche may have been merely intending to provide “moral” guidance to prosecutors as opposed to “legal” guidance.<sup>177</sup>

[7.7.7] Given these contradictions it is difficult to extract a clear and authoritative statement of the law from *Seneviratne* as to the prosecution’s proper role in the calling of witnesses at trial. Indeed, as is suggested by L’Heureux-Dubé J, delivering the unanimous

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<sup>174</sup> [1936] 3 All ER 36 at 48-49.

<sup>175</sup> [1936] 3 All ER 36 at 49.

<sup>176</sup> See *R v Lemay* [1952] 1 SCR 232 at 238-239 per Kerwin J and 256 per Cartwright J. See further the discussion in Part 3 of Chapter 10 as to the persuasive value of *Seneviratne*.

<sup>177</sup> Aronson, M, “Must the Crown Call Adverse Witnesses” [1974] ACLD 152 at 153.

judgment of the Supreme Court of Canada in *R v Cook*,<sup>178</sup> it is difficult to reconcile the two passages quoted above.<sup>179</sup> The judgment is an awkward and not altogether successful effort to resolve the apparent tension in the conflicting roles of the prosecutor. As is observed by L’Heureux-Dubé J, although the Privy Council’s judgement in *Seneviratne* was apparently intended to clarify the existing law, Lord Roche not only failed to achieve this but he “heightened the level of confusion”<sup>180</sup> that has bedevilled this area of the law for almost two centuries.

## Part 8: The Adversarial Role Reaffirmed?

[7.8.1] However, the Privy Council in May 1944 in *El Dabbah v Attorney-General of Palestine*<sup>181</sup> was able to bring some clearer guidance to this long running issue. The accused in this case had been convicted of murder. At trial the prosecutor had not called certain witnesses named upon the indictment or tendered them for the defence to cross-examine. The Court of Criminal Appeal had disagreed with this course of action and indicated that the preferable practice was for the prosecution to tender as part of its case any witness, who was named on the indictment (or “information” as it was known locally), whom they did not wish to call as a witness, for the defence to cross-examine. The Privy Council disagreed. Lord Thankerton, in an influential passage, commented:

...their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognises that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless perhaps, it can be shown that the prosecutor has been influenced by some oblique motive; no such suggestion is made in the present case.<sup>182</sup>

[7.8.2] Lord Thankerton, after referring to both *Woodhead* and *Cassidy*, concluded that:

It is consistent with the discretion of the counsel for the prosecutor, which is thus recognised, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence; and this practice has probably become even more general in recent years, and rightly so – but it is a matter for the discretion of the prosecutor.<sup>183</sup>

[7.8.3] In contrast to *Seneviratne*, the judgment of the Privy Council in *El Dabbah* provides a clear and authoritative statement as to the appropriate role of the prosecution in calling witnesses at trial. The decision should have put to rest any notion from *Seneviratne* that the prosecutor was compelled to call any witness “essential to the narrative.” The

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<sup>178</sup> (1997) 146 DLR (4<sup>th</sup>) 437.

<sup>179</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 447.

<sup>180</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 447.

<sup>181</sup> [1944] 2 All ER 139.

<sup>182</sup> [1944] 2 All ER 139 at 144.

<sup>143</sup> [1944] 2 All ER 139 at 144. Such a “practice” by the prosecution was also noted in *R v McIntyre* but it was expressed to be only a practice and was not a rigid proposition [1965] VR 593 at 595. cf *R v Harry*; *ex parte Eastway* (1985) 39 SASR 203 at 212 per King CJ.

<sup>183</sup> [1944] 2 All ER 139 at 144.

prosecutor had a very broad discretion in his or her choice of witnesses at trial and the court would be unwilling to intervene or interfere in that process in the absence of some “oblique motive” (no indication was provided by Lord Thankerton as what might constitute an “oblique motive”).<sup>184</sup> Though the prosecutor might generally call all the named witnesses or tender them for cross-examination, there was no rule of law requiring this and it remained purely a matter of discretion for the prosecutor. The “strong words”<sup>185</sup> to the contrary offered by Lord Hewart C J in *Harris* were discarded by the Privy Council. Lord Thankerton remarked:

In their Lordships’ view Lord Hewart CJ could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are.<sup>186</sup>

[7.8.4] An example of the circumstances in which the prosecutor was entitled to exercise his or her discretion not to call a witness was provided by the decisions of the Court of Appeal in *R v Bryant and Dickson*<sup>187</sup> in 1946 and *R v Collier*<sup>188</sup> in 1958.<sup>189</sup> In *Bryant* the prosecution had refused the request of the defence to call at trial a material witness called Campbell who had made a statement to the police. The prosecution apparently considered that Campbell had either wittingly or unwittingly facilitated the fraudulent transactions with which the defendants were charged and he was regarded as an unreliable witness. He was not called by the defence. The Court of Appeal dismissed any suggestion that the prosecution had been in error in refusing to call Campbell. Lord Goddard CJ observed, “The prosecution, for reasons which one can well understand did not call Campbell.”<sup>190</sup> Though the defence were unaware of the contents of Campbell’s statement they knew of his existence and identity and had been told by the Director of Public Prosecutions after committal that they were free to take a statement from him. Lord Goddard CJ considered that Campbell had been “available” as a witness and that it was solely an issue for the defence to have called him at trial.<sup>191</sup>

[7.8.5] In *Collier* the situation was even more stark. The accused had been convicted of capital murder. The prosecution case was that the deceased had been killed on about 6 October. The accused asserted that a woman and a police constable had seen the deceased alive on 22 October. The prosecution apparently did not regard either witness

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<sup>184</sup> See the further discussion as to what is meant by this cryptic expression in Part 7 of Chapter 9 and Part 5 of Chapter 10.

<sup>185</sup> *R v Oliva* [1965] 3 All ER 116 at 120 per Lord Parker CJ.

<sup>186</sup> [1944] 2 All ER 139 at 144.

<sup>187</sup> (1946) 31 Cr App R 146.

<sup>188</sup> [1958] Crim LR 544 and *The Times*, 24 June 1958.

<sup>189</sup> These two cases were important in the development of the prosecution’s duty of disclosure, see the discussion in Part 4 of Chapter 5 at [5.4.4].

<sup>190</sup> (1946) 31 Cr App R 146 at 151.

<sup>191</sup> The prosecution had supplied his details, though not his statement, to the defence. This remained the prosecution’s modest obligation of disclosure until this part of *Bryant* was formally overruled by the House of Lords in *R v Mills & Poole* [1997] 3 All ER 776.

as witnesses of truth and neither was called by the prosecution at trial. It is unclear from the brief report whether either witness was named on the indictment. The defence contended on appeal that as the date of the death was of crucial importance to the trial the prosecution should have called the two witnesses, whether they assisted the prosecution case or not. The Court of Appeal disagreed. They considered that if in their investigations the prosecution discovered evidence they considered did not reveal the truth then they were not entitled to suppress it. Though it was the prosecution’s duty to furnish the defence with the names and addresses of the witnesses involved (though not any statement taken) so that the defence had the opportunity of calling the witnesses, the prosecution were not obliged to call the witnesses themselves. It would have placed the prosecution in an impossible position if they were compelled to call witnesses whom they did not believe to be witnesses of truth. Neither the importance of the evidence nor the gravity of the charge altered this proposition.

[7.8.6] *Collier* is a significant decision but one that is only briefly reported and is overlooked in the subsequent cases and literature.<sup>192</sup> The Court of Appeal, even in a case of capital murder, upheld the prosecutor’s wide discretion and rejected any minister of justice type obligation on the part of the prosecutor to call witnesses who could offer evidence of crucial importance in the case, if they were thought to be unreliable. It is significant that apparent unreliability on the part of a potential witness as in *Bryant* and *Collier* is one of the few indications given in the historical cases as constituting a proper circumstance for the prosecution to refrain from calling a material witness at trial. There is an almost total lack of judicial guidance as to when it would be appropriate or legitimate at either committal or trial for the prosecutor to call, or not call, a significant, or even an essential, witness. Similarly there is little judicial guidance as to when the prosecutor might properly refrain from listing a relevant, or even a crucial, witness on the back of the indictment.<sup>193</sup>

[7.8.7] However, what is clear from *El Dabbah* is that the prosecution possesses a broad discretion in its choice of witnesses at trial. *Bryant* and *Collier* merely demonstrate that unreliability on the part of a potential prosecution witness is merely *one* illustration of the circumstances when the prosecution will be entitled to exercise their wide discretion not to call a material witness. *El Dabbah* is a landmark decision in this area and represents an explicit acceptance by the Privy Council of the “adversarial” concept of the prosecutor’s role in calling witnesses at trial. This decision reflects the adversarial nature of the modern criminal trial and that by 1936 any lingering justification for the minister

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<sup>192</sup> The case is only briefly reported in the Criminal Law Review. It is even unclear from the report whether the two witnesses were even named on the back of the indictment.

<sup>193</sup> These particular points have arisen acutely in recent years to concern modern prosecutors, particularly in connection with the regard to be had now to the views of victims and witnesses and contemporary practices of “victimless” prosecutions and “no drop” prosecutions. The need to pay regard to the views and welfare of victims and witnesses in the criminal justice system is a comparatively recent development and it is hardly surprising that the historical cases are largely silent on what is now an increasingly prominent feature of modern criminal practice. Not only must the prosecution lawyer (and the wider criminal justice system) now be responsive to the welfare of victims and witnesses but additionally over recent years the prosecuting lawyer in both Australia and England must now be mindful of the views and interests of witnesses and victims. However, the prosecutor acts on behalf of the public at large and the modern need to be responsive to victims can result in further complications and tensions in the prosecution’s choice of witnesses, notably in cases of family violence. See Hall, Ch 4, n 76, 40-41. This matter is beyond the scope of this Thesis.

of justice role in calling witnesses, as had existed in the early 1800s, did not apparently trouble the Privy Council in this area. The expansive minister of justice model as expressed by Lord Hewart CJ in *Harris* and in certain of the pre-*Woodhead* authorities had been clearly rejected.

## Part 9: Renewed Inconsistency

[7.9.1] Unfortunately *El Dabbah* was not to prove conclusive. Consistency in this area of the law was to again prove sorely lacking. Only two months after the decision in *El Dabbah* the Court of the Criminal Appeal in *R v Treacy*<sup>194</sup> was to “muddy the water” as to the extent of the prosecutorial “discretion” in calling witnesses. Humphreys J in this case, as quoted previously, advanced a strong minister of justice view in relation to the prosecutor’s duty in presenting evidence at trial. This duty arose regardless of whether the witness assisted the prosecution case or not. However, it is significant that these comments were unnecessary for the resolution of the principal issue before the Court of Appeal. The main issue before the court in *Treacy* concerned the sudden introduction by prosecution counsel during the cross-examination of the accused in a murder trial of two potentially incriminating documents that were claimed, somewhat speculatively, to have demonstrated a motive for the crime.<sup>195</sup> Significantly, these documents had being neither produced or even mentioned at the committal proceedings or during the presentation of the prosecution case at trial. The defence had been “totally unaware” of their existence, let alone their contents.<sup>196</sup> The action of prosecution counsel was deplored by Humphreys J who pointed out that it had been wrong for the prosecution to have effectively “ambushed” the defence at trial with such material. If the documents were irrelevant then they ought never to have been referred to, let alone produced.<sup>197</sup> If they were relevant and incriminating then they should have been adduced and proved by the prosecutor as part of its case by being produced, if not at committal then certainly at trial, by calling the police officer who had found them.

[7.9.2] *Treacy* is an application of the rule in criminal proceedings that prevents the prosecution from “splitting” its case at trial.<sup>198</sup> This rule is important in preventing the defence being “ambushed” in cross-examination by the prosecution suddenly presenting previously undisclosed material.<sup>199</sup> If the prosecution has evidence upon which it is

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<sup>194</sup> [1944] 2 All ER 231.

<sup>195</sup> The defendant was charged with the murder of his lover. There was “extremely strong” circumstantial evidence to link the defendant to the crime [1944] 2 All ER 231 at 233. However, a weakness in the prosecution’s case was the complete lack of evidence of any motive or desire on the defendant’s part to have murdered his lover.

<sup>145</sup> [1944] 2 All ER 231 at 234. This case further illustrates that the informal “Old Boys Act” approach to disclosure clearly did not ensure that the defence would be furnished with all relevant material and/or prevent the prosecution from resorting to a partisan trial by ambush. See further the discussion in Part 4 of Chapter 5.

<sup>197</sup> Humphreys J concluded that the two documents were “utterly irrelevant in the case” and “highly prejudicial” and they should never have been produced [1944] 2 All ER 231 at 235.

<sup>198</sup> See the recent decision on point of the High Court of Australia in *R v Soma* (2003) 221 CLR 299.

<sup>199</sup> See, for example, *R v Kane* (1977) 65 Cr App R 270, *R v Chin* (1985) 157 CLR 671 and *R v Phillipson* (1989) 91 Cr App R 226.

proposing to rely, then such evidence must be presented as part of the prosecution case and not subsequently introduced during cross-examination of the accused.

[7.9.3] Humphreys J went beyond this proposition in insisting that the prosecution were under a positive duty to adduce at trial all relevant evidence, whether it assisted the prosecution case or not. *Treacy* cannot be regarded as a strongly persuasive authority on this point. Not only is the view of Humphreys J inconsistent with cases such as *El-Dabbah* and *Woodhead* but, as with the similar comments of Lord Hewart CJ in *Harris* rejected in *El-Dabbah*, they are on close scrutiny merely *obiter* and of weak persuasive value. As Eichelbaum CJ in 1997 in the New Zealand case of *R v Wilson*<sup>200</sup> commented, “The broad remarks in the judgment [in *Treacy*]...cannot be regarded as statements of general principle.”<sup>201</sup>

## **Part 10: The Historical Position in Australia 1824 to 1955: The Adversarial Role Unchallenged**

[7.10.1] As was noted in Chapters 2 and 3 despite their common legal background there were significant differences between the operation of the criminal processes of England and Australia. In particular there was no equivalent measure in Australia to the examination of witnesses in England before a grand jury to find a bill of indictment.<sup>202</sup> Furthermore it would seem that the Australian courts did not explicitly embrace the notion of the prosecutor as a minister of justice until as late as 1946.<sup>203</sup>

[7.10.2] It is therefore interesting to find that a similar apparent confusion as to the prosecutorial role in calling witnesses as had been shown in England was also demonstrated in Australia, at least in the first half of the 1800s. Though on occasion one finds prosecution counsel calling witnesses purely in order to afford the defence an opportunity to cross-examine them,<sup>204</sup> in the trial of *R v Wilson and Others*<sup>205</sup> in 1843 there was terse disagreement between the Attorney-General and the trial judge, Montagu J, as to the extent of the prosecutorial duty in calling witnesses. Montagu J, conscious of Government complaints of the cost of criminal trials,<sup>206</sup> stated that it was not incumbent upon the prosecution to call at trial all the witnesses named on the indictment who had been examined by the Magistrate and that the Attorney-General had a discretion to call only those witnesses whom he thought were strictly necessary to prove his case. Indeed, Montagu J said that if he was the Attorney-General he would in a suitable case in the exercise of the prosecution’s discretion strike out all the witnesses to be called, except the prosecutor (ie the victim or the complainant) who ought to have the onus of proving his

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<sup>200</sup> [1997] 2 NZLR 500.

<sup>201</sup> [1997] 2 NZLR 500 at 508.

<sup>202</sup> See Chapter 3, n 28. See further the comments of the Attorney-General in *R v Donnison* (*Sydney Herald*, 2 March 1837) and *R v Bingle & Were* [1837] NSWSupC 25 (*Sydney Herald*, 15 May 1837).

<sup>203</sup> *R v Bathgate* (1946) 46 SR (NSW) 281 at 284-285. See further Part 7 of Chapter 3.

<sup>204</sup> See the cases cited above at n 98.

<sup>205</sup> *Hobart Town Advertiser*, 28 April 1843. The three defendants were escaped convicts who were charged with burglary.

<sup>206</sup> It is reassuring to discover that Government complaints about the cost of criminal trials are not new.



or her case!<sup>207</sup> The Attorney-General, demonstrating a notion of his role as a minister of justice, protested that as a “public prosecutor” he had been “placed in a very awkward position by his Honour’s observations.”<sup>208</sup> The Attorney-General noted that defence counsel would have insisted on all witnesses named on the indictment being called at trial and that he had known prisoners acquitted when that had not happened. “It was a principle in law, and it was also due to a prisoner, to have all the witnesses called that were examined by the Magistrate, to give him an opportunity to cross-examine them, even if they were not examined by the Crown.”<sup>209</sup>

[7.10.3] Subsequently in the relatively few formally reported cases to deal with this issue, the courts in Australia refrained from stating, let alone applying, any demanding minister of justice obligation, as had happened in England or Ireland in cases such as *Holden* or *Holland*. Rather the courts in Australia, consistent with the view expressed in *Wilson* by Montagu J (albeit not expressed quite as bluntly as he had), explicitly recognised a wide degree of prosecution discretion in its choice of witnesses at trial. The prosecution were not bound to call or tender for cross-examination all the witnesses named on the back of the indictment, though in accordance with *Cassidy* and *Woodhead* they ought to have them in court so the defence could call them if they so wished.<sup>210</sup>

[7.10.4] This point was confirmed by several Australian decisions.<sup>211</sup> For instance in 1909 in *R v Twynings*<sup>212</sup> prosecution counsel at trial refused to call certain witnesses who had given evidence at the committal. The defence contended that the evidence of the witnesses was “material” and that “the prisoners should be given the benefit of having such evidence put before the Court without being forced themselves to call the witnesses.”<sup>213</sup> The trial judge, Chubb J, called two of the witnesses himself upon being satisfied that their evidence was material.<sup>214</sup> But what is significant from *Twynings* is that there is no indication in the decision that the prosecutor had acted incorrectly and was not entitled to refuse to call the witnesses at the trial.

[7.10.5] A similar view was taken by Chubb J in 1915 in *R v Thonemann*.<sup>215</sup> The prosecutor<sup>216</sup> refused to call a witness at trial who had given evidence for the prosecution

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<sup>207</sup> *Hobart Town Advertiser*, 28 April 1843.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> See Gurner, F, *The Practice of the Criminal Law of the Colony of Victoria* (Melbourne, Stillwell and Knight, 1871), p 88.

<sup>211</sup> See *R v Hume* (1901) 11 QLJ (NC) 31.

<sup>212</sup> (1909) 4 QJPR 1.

<sup>213</sup> (1909) 4 QJPR 1.

<sup>214</sup> Though this is consistent with the approach taken in some of the earlier cases such as *Simmonds* it must be regarded as a bad practice in light of the later contrary authorities on point such as *R v Harris* [1927] 2 KB 587, *R v Cleghorn* [1967] 1 All ER 996 and *R v Apostilides* (1984) 154 CLR 563. See further above n 156 and Chapter 8, n 108. For the trial judge to call the witnesses as Chubb J had appears to reflect “some lingering inquisitorial view of the role ascribed to the trial judge” (*R v Skubevski* [1977] WAR 129 at 139 per Brinsden J).

<sup>215</sup> (1915) 9 QJP 31.

<sup>216</sup> Incidentally, the same prosecution counsel as in *Twynings*.

at committal. Defence counsel relied on *Barley* and asserted that it was the “duty” of the Crown Prosecutor to call all the witnesses who had given evidence in the court below.<sup>217</sup> Failing that, the defence, relying on *R v Simmonds*, asked the Chubb J to call the witness. The prosecutor relied upon *Woodhead* and *Cassidy* and contended that he was not required to call the witness. He argued that there was no rule, or at least not in Queensland, that compelled the prosecutor to call all the witnesses who had given evidence at committal and were named on the back of the indictment and there was no precedent for such a ruling. The prosecutor also noted that the witness was considered unnecessary to the establishment of his case and that the witness may have had an “unconscious bias” in favour of the accused.<sup>218</sup>

[7.10.6] Chubb J noted that the defence were at liberty to call the witness themselves and that the Crown was entitled not to call the witness. If the prosecution refused to call the witness then it was an issue for the judge’s discretion whether or not to call the witness. Although Chubb J did proceed to call the witness,<sup>219</sup> it is notable that there was no criticism in this case of the prosecutor’s decision or questioning of his entitlement to refuse to call the witness.

[7.10.7] In 1917 in *R v McMaster*<sup>220</sup> the prosecutor closed his case without calling a witness who had given evidence at committal. The prosecutor indicated that the witness was available at court to give evidence if the defence chose to call him.<sup>221</sup> Defence counsel objected and asserted that such a course of action was “not proper, and without precedent.”<sup>222</sup> The witness was material and should be tendered by the prosecutor for the purpose of cross-examination. The trial judge, Shand J, disagreed. He held that the duty of the prosecution was simply to have all witnesses in attendance at the trial, presumably so the defence could call any witness the prosecution were not proposing to call. The prosecution were not bound to call all the witnesses who had given evidence at committal.

[7.10.8] This issue came before the New South Wales Court of Criminal Appeal in 1932 in *R v Trimarchi*.<sup>223</sup> The accused had been convicted of murdering his father. He asserted that he had acted in self-defence after the deceased had violently attacked him and his mother. The mother supported her son’s account at committal when she was called as a prosecution witness. The prosecution did not call her at trial and she was called by the defence. The trial judge had refused to either “direct”<sup>224</sup> the prosecution to call the

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<sup>217</sup> (1915) 9 QJP 31.

<sup>218</sup> (1915) 9 QJP 31. This explanation has dual significance. First, the prosecutor considered he need not call an unnecessary witness. Secondly, even an “unconscious bias” on the part of a witness would justify a decision not to call him or her at trial. As will be considered in Part 6 of Chapter 9 such an explanation would be unlikely to be regarded as ample justification in a modern context in Australia for refusing to call a witness.

<sup>219</sup> Again this would not accord with either the balance of historical or modern authority on point.

<sup>220</sup> [1918] QSR 57.

<sup>221</sup> Again such a practice is in accordance with *Woodhead* and *Cassidy*.

<sup>222</sup> [1918] QSR 57.

<sup>223</sup> (1932) 32 SR (NSW) 451.

<sup>224</sup> (1932) 32 SR (NSW) 451 at 453.

witness or to call her himself. This decision was upheld by the Court of Appeal. James J, delivering the court’s judgment, pronounced that the court had “no difficulty” in concluding that the court had neither the duty nor the power to compel the prosecution to call a witness.<sup>225</sup> Indeed, the court had no power to call a witness in these circumstances.<sup>226</sup> There was no criticism of, or even issue with, the entitlement of the prosecution to refuse to call the mother.<sup>227</sup>

[7.10.9] The cases in Australia demonstrate clearly that there was no obligation upon the prosecution to call the witnesses named on the back of the indictment who had given evidence at committal. Rather the prosecutor possessed a broad discretion, consistent with *Woodhead*, to call only those witnesses that he considered should be called. It may have been “a discretion always exercised”<sup>228</sup> in felonies, if not misdemeanours, or to have been “usual” in Australia, as in England as noted by the Privy Council in *El Dabbah*, for the prosecution to call at trial any witness named on the back of the indictment “in order that the prisoner may have an opportunity of cross-examining them.”<sup>229</sup> But it was only a “practice.”<sup>230</sup> As *Woodhead* and *El Dabbah* and the Australian cases make clear, there was no rule of law to this effect. The prosecutor retained a wide discretion in this regard. The duty on the prosecutor was confined to ensuring the attendance of a witness named on the back of the indictment at trial in case the defence chose to call them. This would seem to have been the settled position in Australia, prior to the decision of the High Court in 1957 in *Ziems v Prothonotary of the Supreme Court of New South Wales*.<sup>231</sup>

## Part 11: Historical Development: Calling Witnesses at Committal

[7.11.1] No consideration of the historical development of the role of the prosecutor in calling witnesses at trial would be complete without also considering the closely linked question of the responsibility of the prosecutor in calling witnesses or adducing evidence at committal or at the preliminary hearing. The minister of justice concept of the

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<sup>225</sup> This is consistent with most modern Australian and English authority on this issue, see Chapter 8, n 105.

<sup>226</sup> This is consistent with the modern Australian and English positions on this issue, see Chapter 8, n 108.

<sup>227</sup> See also the similar approach taken in both New Zealand (see *R v Moore* (1902) 5 GLR 193, *R v Sinclair* (1905) 25 NZLR 266 and *Lang v Reid* [1916] NZLR 1186 at 1192-1193) and Canada (see *R v Tilford* [1935] 4 DLR 691, *R v Sing* [1936] 1 DLR 36 and *R v Mandryk* [1939] 3 DLR 543) where any minister of justice obligation on the prosecution to call any witness named on the back of the indictment or any material witness in the case regardless of their allegiance and benefit to the prosecution case was also rejected. In *Moore* the prosecution refused to call a witness who had appeared before the committing Magistrate, presumably as a Crown witness, but had not been named on the indictment on the basis that the witness was considered to be “untrustworthy” (1902) 5 GLR 193 at 194. The trial judge, Edwards J, having consulted with Stout CJ and Williams and Denniston JJ, held that the prosecution had never been under any duty either to call such a witness or to tender him for cross-examination. It was for the defence to call him. The witness, who had been kept at court by the prosecution in case the defence wished to call her, was called by the defence. In *Sinclair* and *Lang v Reid* it was confirmed that the prosecution were entitled to refuse to call a witness named on the back of the indictment (though in both cases it was considered proper for the court to call the witness in question) and in neither case does it seem that the witness was viewed as untrustworthy.

<sup>228</sup> Gurner, above n 210, 88.

<sup>229</sup> *R v Sinclair* (1905) 25 NZLR 266 at 267 per Stout CJ.

<sup>230</sup> *R v McIntyre* [1965] VR 593 at 595 per Winneke CJ.

<sup>231</sup> (1957) 97 CLR 292. See further the discussion of this case in Part 2 of Chapter 9.

prosecutorial role in calling witnesses as suggested by a number of the cases discussed, should encourage the prosecutor to take a similar expansive view of his or her duty and to call any significant witness at committal, whether that witness was likely to assist the prosecution case or not. How else would a witness come to be on the back of the indictment to be called at trial?<sup>232</sup> This theme emerges from such comments as those of Alderson B in *Carpenter* when he spoke of the right of the prisoner to the production by the prosecution of witnesses who told in his favour and Wright J in *Holland* when he stated that the two women the prosecution had been loath to call, should in fact have been called at both the committal and the trial.

[7.11.2] However, it is a misconception to speak of the early cases establishing a clear rule that required the prosecutor to call all the relevant witnesses in a case at committal. Prior to 1836 and the passage of the *Prisoners’ Counsel Act* the accused had minimal entitlement to notice of the prosecution case against him but after this Act at least secured the right to knowledge of the depositions that had been given in his case at the committal stage. However, according to the view taken by Patteson J in *R v Connor*<sup>233</sup> the prosecutor was under no strict obligation to provide to an accused any statement of a witness taken post-committal that the prosecutor intended to adduce at trial. This would have enabled an unscrupulous or an especially partisan prosecutor to have deliberately held back any witness at committal and to have introduced the evidence of such a witness post-committal. This would have left the defence unaware of the evidence of such a witness until trial.<sup>234</sup> Indeed, such a fear was expressed by the defence counsel in *Connor* who spoke of the “great injustice” that would have resulted if the provisions of the 1836 Act had been “altogether evaded by the prosecutor, who might keep back the most important witnesses when before the magistrate, and obtain a committal on wholly insufficient testimony.”<sup>235</sup> The courts in England viewed such a dubious prosecutorial practice with unease and encouraged the disclosure of the substance of the additional evidence by the prosecutor.<sup>236</sup> However there was no firm rule of law or practice to this effect. It was eventually held that the defence were entitled to an adjournment of any trial where the prosecutor introduced new hitherto unseen evidence to allow them an opportunity to deal with the new evidence.<sup>237</sup>

[7.11.3] The courts never formulated any rule requiring the prosecutor to call all witnesses or lead all evidence at the committal stage. The prosecutor was not prevented later at trial from introducing evidence or calling witnesses that had not been adduced at

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<sup>232</sup> See further *R v Harry; ex p Eastway* (1985) 39 SASR 203 at 212 where King CJ observed that the very fact that the duty of the prosecution counsel at trial was often expressed in terms of calling all the witnesses whose names appeared on the back of the indictment because they had made depositions at committal was “striking confirmation of the traditional practice of taking depositions at the committal proceedings from *all* [my emphasis] material witnesses.”

<sup>233</sup> (1845) 1 Cox CC 233.

<sup>234</sup> Such a situation emerged in Ireland, see Bentley, Ch 2 n 158, 37, especially n 20 and n 21.

<sup>235</sup> (1845) 1 Cox CC 233. See the similar fears expressed in *R v Ross* (*Launceston Courier*, 14 March 1842).

<sup>236</sup> See *R v Greenslade* (1870) 11 Cox CC 412 and 413, n (a), quoting Willies J’s remark to the report writer that the “proper course” was for the prosecutor to disclose the additional evidence. See further *R v Pearson* [1953] QWN 18 and *R v Devenish* [1969] VR 737 at 739.

<sup>237</sup> See *R v Flannagan & Higgins* (1884) 15 Cox CC 403.

committal or been before the examining magistrate. Several of the early cases from both Australia and Britain demonstrate this proposition. In 1842 in the Tasmanian case of *R v Ross*<sup>238</sup> defence counsel protested that the “express intention” of the 1836 Act would be “grievously thwarted” if the prosecution were allowed at trial to call a witness who had not given evidence at committal and whose evidence had not been furnished to the defence.<sup>239</sup> The trial judge overruled this objection and the witness was permitted to be called. Similarly, in 1848 in *R v Ward*<sup>240</sup> during the course of a trial for burglary the complaint of the defence that the object of the 1836 Act had been defeated when a prosecution witness gave material evidence which had not been referred to in his deposition at committal was rejected. Cresswell J commented though it was “only fair”<sup>241</sup> for the defence to be apprised of the character of such further evidence it was “by no means incumbent on the prosecutor to refrain from giving, at the trial, any additional evidence which may be discovered subsequently to the taking of the depositions.”<sup>242</sup>

[7.11.4] This point also emerged from *R v Petcherini*<sup>243</sup> before Crampton J and Greene B in 1856. This case concerned the prosecution of a monk in Dublin for burning Bibles. The prosecution sought to call a witness called Rebecca Whittle, who had not given a deposition (or “information” as it was locally known) at committal. The defence objected to the reception of her evidence and contended that the prosecution had no right to produce a witness at trial who had not first given an “information” at the committal. The defence stated that the local practice was that such evidence would be routinely excluded unless the witness had appeared unexpectedly after committal. They relied on an unreported Irish decision of Perrin J to the effect that it was unfair to a defendant “that a witness should lie by or be kept back without making an information, and thus deprive a prisoner of means of making cross-examination, or of making enquiries.”<sup>244</sup> Crampton J remarked that he had never paid regard to an unreported case and that he had been following a contrary practice to that urged by the defence for 21 years. The defence further argued that the unreported view of Perrin J accorded with the practice in England. Crampton J disagreed, stating, “I think you must be under a mistake. We cannot adopt such a rule.”<sup>245</sup> Greene B concurred. The witness was allowed to give evidence.

[7.11.5] This point was confirmed in 1870 in *R v Greenslade*.<sup>246</sup> At trial the prosecutor proposed to call a witness whose name did not appear on the depositions taken before the magistrate. The defence objected and asserted that it was “most unfair to call a witness who had not given evidence before the magistrates.”<sup>247</sup> Brett J stated that there

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<sup>238</sup> *Launceston Courier*, 14 March 1842.

<sup>239</sup> *Ibid.*

<sup>240</sup> (1848) 2 Car & Kir 758.

<sup>241</sup> (1848) 2 Car & Kir 758.

<sup>242</sup> (1848) 2 Car & Kir 758.

<sup>243</sup> (1856) 7 Cox CC 79.

<sup>244</sup> (1856) 7 Cox CC 79 at 82.

<sup>245</sup> (1856) 7 Cox CC 79 at 82.

<sup>246</sup> (1870) 11 Cox CC 412.

<sup>247</sup> (1870) 11 Cox CC 412.

was no such practice and admitted the evidence.<sup>248</sup> This approach was applied in Australia. A number of cases held that there was no rule of either law or practice that required the prosecution to call all its witnesses at committal.<sup>249</sup> The prosecution were at liberty to call at trial additional witnesses who had not given evidence at committal.<sup>250</sup>

[7.11.6] It would appear that the general custom throughout the 1800s and, indeed, for much of the 1900s, was that the prosecutor ordinarily called any material witness to the events in question to make a deposition at the committal.<sup>251</sup> However, as with the situation described in *El Dabbah*, though there may have been a general and longstanding practice to that effect, the prosecution was not under any obligation or duty as regards the tendering of witnesses at committal and this matter ultimately remained within the discretion of the prosecutor in each particular case. There was no rule compelling the prosecution to call all relevant or material witnesses at the committal stage.<sup>252</sup> The adversarial role adopted by the historical cases at committal as to the prosecution’s broad discretion in its choice of witnesses is consistent with the settled position that had ultimately emerged from the historical cases as to the prosecution’s choice of witnesses at trial.

## Part 12: Historical Development: Can any Conclusions be Drawn?

[7.12.1] A study of the historical cases from *Oldroyd* in 1805 and *Simmonds* in 1823 through to the 1950s demonstrates pronounced and recurring inconsistencies in judicial approach. There is no doubt that uniformity in this area, especially in England, proved sorely lacking during this period. As has been seen, on some occasions the courts emphasised the minister of justice dimension of the prosecution’s choice of the witnesses to call at trial. On other occasions the courts recognised the adversarial reality of the criminal process and accorded a broad discretion to the prosecution in its selection of the witnesses to be called. The tension between these contrasting roles was never entirely resolved.

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<sup>248</sup> Though it was preferable that notice of the additional evidence be given prior to trial to the accused or his attorney, see *R v Greenslade* (1870) 11 Cox CC 412.

<sup>249</sup> See *R v Brown* (1869) 6 WW & a’B 239, *R v Smith* (1872) 11 SCR (NSW) 69 and *R v Schreibvogel* (1884) 10 VLR 92. See also the comment of Smith CJ in *R v Job Smith (Mercury)*, 13 May 1875 that when Attorney-General he had often called additional evidence post-committal and this might well be advisable.

<sup>250</sup> Though, as in England, it was deemed desirable that the evidence of any such witness should be served to the defence in advance of trial, see *R v Brown* (1869) 6 WW & a’B 239.

<sup>251</sup> One rationale for this custom would appear to be that in the absence of a formal system of proper disclosure the committal hearing was a forum where the accused was afforded an opportunity to discover and appreciate the nature of the prosecution case against him or her, see *R v Arviv* (1985) 19 CCC (3d) 395 at 403 and *R v Harry, ex p Eastway* (1985) 39 SASR 203 at 211 per King CJ. There is a divergence of opinion between England and Australia in modern times as to whether this remains a purpose of the committal proceedings and whether the minister of justice approach to calling witnesses extends to committal, see further Chapter 8, n 58.

<sup>252</sup> See *Summers v Cosgriff* [1979] VR 564 at 568. cf Editor, “Commentary [to *R v Epping and Harrow Justices, ex parte Massaro*]” [1973] Crim LR 109 that although it had been clear since *R v Ward* (1948) 2 C & K 759 that the prosecution wasn’t compelled to call all its witnesses at committal, it did not necessarily follow that the prosecution could deliberately hold back at committal the testimony of witnesses then known to them.

[7.12.2] Given the clear inconsistencies shown in the historical cases it is arguable whether it is possible to distil any clear or authoritative principles from those cases. An effort was made in 1959 by the editor of the Criminal Law Review in reply to a question from a reader to summarise the correct principles to be drawn from the historical cases.<sup>253</sup> However, the confidence expressed by the editor proved misplaced. The editor was unable to reconcile the contradictory decisions and the tensions of the conflicting prosecutorial roles as to its choice of witnesses.<sup>254</sup>

[7.12.3] The persuasive value of the historical cases may be questionable. Not only are there the differing and divergent views expressed in the various cases but there is the additional issue as to the relevance in the early 21<sup>st</sup> century in England and Australia of cases decided at a time when the criminal process in both jurisdictions differed so much to that existing today.

[7.12.4] This point was made by Schiemann LJ, delivering the judgment of the Court of Appeal in 1996 in *R v Brown and Brown*.<sup>255</sup> Schiemann LJ, confronting a defence appeal based on the prosecution’s purported failure to call or tender a material witness at trial whose statement had been included in the “committal bundle,”<sup>256</sup> remarked:

Submissions in support of this ground of appeal frequently involve citing cases decided long ago and they seldom succeed nowadays, where the defence had the opportunity of themselves calling the relevant witnesses. A lot of the early case law developed in times when the practice and procedures governing criminal trials were markedly different from those currently existing. In the past many, if not most defendants, on arraignment at Assizes or Quarter Sessions were unrepresented. If a defendant pleaded not guilty and was unable to afford a dock brief, the judge would usually nominate a member of the Bar in court to defend him. Only exceptionally would a solicitor be allocated, for example, if alibi witnesses had to be interviewed. In those days all committals were oral. Disclosure of unused material was a rarity.

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<sup>253</sup> KH, “Practical Problems: Duty of the Prosecution in Calling Witnesses” [1959] Crim LR 603 and MD, “Answer” [1959] Crim LR 603-604.

<sup>254</sup> See *Ibid*. The editor was correct in describing the effect of cases such as *Collier and Bryant* and *Gordon* as to the prosecution’s entitlement not to call a witness believed to be untruthful and its then limited duty of disclosure. But the editor was then wrong when he asserted that the prosecution were under a duty not to only make available at trial any witness named on the back of the indictment but if they did not wish to call such a witness they were still required to tender them for cross examination. The editor wrongly cited *Woodhead* and *Cassidy* as support for this proposition when it is clear those cases had rejected any such prosecutorial obligation to call or tender such witnesses. If the prosecutor refused to call a witness named on the back of the indictment the editor asserted that the judge possessed a “complete discretion to do so” and this view represented “the present recognised position in English law. Any of the older inconsistent authorities must now be disregarded” *Ibid*, 604. Though *R v Simmonds* (1823) 1 Car & P 84 was cited in support of this proposition, the editor overlooked the strong line of authority after *Simmonds* that had repeatedly stressed the exceptional nature of the judge’s power to call a witness, see *R v Edwards & Ors* (1848) 3 Cox CC 82 and *R v Harris* [1927] 2 KB 587. See also above n 156 and Chapter 8, 108.

<sup>255</sup> *R v Brown & Brown* [1997] 1 Cr App R 112.

<sup>256</sup> This is the modern equivalent of naming a witness on the “back of the indictment,” see above n 12.

Nowadays most defendants will have instructed solicitors on their arrest. Their solicitor will be present and giving advice during interview. There is full disclosure of all unused material well before the trial...<sup>257</sup>

[7.12.5] This observation is not without merit. As has been discussed in Chapters 2 and 4 there are fundamental differences between the criminal law and procedure as existing in Australia and England in modern times and that practised in the early part of the nineteenth century. However, though Schiemann LJ may have seen little purpose in the citation or consideration of “cases decided long ago,” I would argue that the value of the “historical” cases as discussed in this Chapter should not be lightly dismissed. They are revealing in demonstrating the recurring inconsistencies in judicial approach and the ongoing tension between the roles of the prosecutor as a minister of justice and as an adversarial advocate in the selection and calling of witnesses. The development of the common law is typically a gradual and evolutionary process and the course of the law relating to the duty of the prosecution in the selection and calling of witnesses is no exception. The modern law on the prosecutorial role can only be appreciated properly through an examination of its evolution and a consideration of the “historical” cases. Furthermore it is my argument that a scrutiny of the historical cases shows how the law had arrived at a settled position and that the “modern” cases in both England and Australia that have adopted the minister of justice role of the prosecutor in calling witnesses in preference to the adversarial role rest on an unsound foundation in precedent and have misapplied the relevant law.

[7.12.6] I would submit that what does ultimately, and crucially, emerge from the historical decisions, especially the considered *Woodhead* line of authority and the crucial decision of *El Dabbah*, is the explicit rejection of any “minister of justice” duty on the prosecution to adduce all relevant evidence at trial, regardless of its value or worth to the prosecution case. The prosecution were not required to call or tender all the witnesses named on the back of the indictment or included at committal and the prosecutor enjoyed a wide discretion as to how the prosecution case would be presented and what witnesses would be called at trial. This fundamental premise had developed despite the fact that throughout the period from 1823 to 1964 an accused enjoyed only a limited entitlement to disclosure of the evidence against him and very little, if any, entitlement to disclosure of what is now termed “unused material.” Despite the fact that the rationale for the prosecutor’s minister of justice role in calling witnesses may have lingered, the historical cases still ultimately and clearly rejected this role. The persuasive value of cases such as *Woodhead*, *Cassidy* and *Edwards* cannot be discounted on the simplistic basis that these are “cases decided long ago.” Indeed, in the first “modern” case on this issue in 1965, *R v Oliva*,<sup>258</sup> the Court of Appeal explicitly recognised the continued authoritative status of the *Woodhead* line of authority. These cases were to be taken as still accurately stating the appropriate broad discretion conferred on the prosecution in its selection and calling of witnesses. Lord Parker CJ in *Oliva* commented about the continued applicability of *Woodhead*; “It seems to this court that, once this rule of practice was laid down in 1847, it has continued in full force and remains in full force to this day.”<sup>259</sup> Alderson B in

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<sup>257</sup> [1997] 1 Cr App R 112 at 113.

<sup>258</sup> *R v Oliva* [1965] 3 All ER 116.

<sup>259</sup> [1965] 3 All ER 116 at 120.



*Woodhead* had stated that the “only sensible solution” was that the party who wished the testimony of a particular witness should call that witness and the prosecutor was therefore under no obligation to call a witness named on the back of the indictment.<sup>260</sup> Lord Parker appeared to support this proposition.

[7.12.7] Despite the confusions and inconsistencies that are apparent from the historical cases and the misplaced confidence of the editor of the Criminal Law Review on this issue, I would submit that certain propositions do emerge from a close scrutiny of the line of the historical cases. These propositions can be clearly stated in the following terms:

1. Despite indications to the contrary in certain decisions (eg. *Holden, Holland*), it is undesirable for a judge to interfere with the prosecution’s selection of witnesses. The choice is one for the prosecutor, (*Edwards*). A judge does possess a power to call a witness at trial but this is a power that should be sparingly exercised and with great caution, (*Edwards, Harris*).
2. A judge is only entitled to interfere with the exercise of the prosecution’s discretion in calling witnesses if it is demonstrated that the prosecutor has acted out of an “oblique motive” (*El Dabbah*). Presumably behaviour such as prosecutorial bad faith would also suffice.
3. The prosecutor does not enjoy an adversarial “blank cheque” as regards the presentation of the prosecution case and the selection of witnesses. The prosecutor is subject to the usual professional constraints. He is still required to act as a “minister of public justice” (*Edwards*) or, to avoid a potentially confusing label, act with “absolute fairness” (*Nicholson*) or with the customary candour and fairness that one would expect of any prosecuting lawyer (*Seneviratne*).
4. Whatever label or definition is attached to the prosecutor’s duty in this area, that duty does not extend to him or her being effectively required to conduct the case for the defence. That is the responsibility of the defence (*Seneviratne*, Diplock LJ in *Dallison v Caffery*).
5. The prosecutor need not call or adduce the evidence of all the witnesses in the case at the committal or preliminary stage (*Petcherini, Ward, Greenslade*, the early Australian cases).
6. Despite regular suggestions to the contrary, the prosecution is *not* [my emphasis] required to call in its own case all the witnesses named on the back of the indictment. The prosecution enjoys a wide discretion as to the witnesses that it will call at trial (*Woodhead, Cassidy, Edwards, El Dabbah* and the early Australian cases).
7. The prosecution has a duty to ensure the attendance at court of a witness named on the back of the indictment whom the prosecution do not intend to call in order that the defence might choose to call him or her as a defence witness. (*Woodhead and Cassidy*).

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<sup>260</sup> (1847) 2 Car & P 520.

8. A prosecutor is entitled not to call a particular witness if the witness is considered to be untruthful or unreliable (*Seneviratne, Bryant and Collier*) or the evidence is peripheral or repetitive or would merely serve to confuse the jury (*Seneviratne*).
9. There is an absence of historical authority as to the other circumstances in which it might be legitimate for the prosecution not to call a witness, perhaps even a vital witness, at either committal or trial. But unreliability or repetition were never intended to be the only grounds upon which the prosecution would be entitled to refuse to call a material witness, (*Woodhead, El Dabbah, and Thonemann*).
10. There are suggestions of the need for the prosecution to call any witness named on the indictment (*Carpenter*) or essential to the unfolding of the narratives on which the prosecution is based (*Seneviratne*) or all witnesses who were present at the relevant “transaction” (*Holden*) or incident (*Holland*). However, it is wrong to elevate any such suggestions to a binding rule of law or practice. The prosecution’s ordinary wide discretion is not to be negated (*El Dabbah*).

[7.12.8] In 1964 in *Dallison v Caffery*<sup>261</sup> Lord Denning MR and Diplock LJ at the Court of Appeal had occasion to offer some *obiter*<sup>262</sup> observations as to the scope of any duty of the prosecution in calling witnesses. This case can be regarded as the last of the “historical” cases in England that considered the issue before the first “modern” authority on this issue in England in 1965, *R v Olivia*.<sup>263</sup> It is unsurprising that *Dallison v Caffery*, the last of the historical cases, reflects the “ancient conflict” in authorities and was to prove typically unclear about the precise extent of the prosecution’s “duty” or “discretion” in calling witnesses. If the prosecution knew of a credible witness who could testify to the innocence of the accused then Lord Denning MR stated that the prosecution “must either call that witness himself or make his statement available to the defence.”<sup>264</sup> If the prosecution did not regard the witness as credible, then they merely had to tell the defence about the witness so that they could call him or her if they so wished. By way of contrast it will be recalled<sup>265</sup> that Diplock LJ in this case had suggested an adversarial concept of the role of the prosecutor and had rejected any minister of justice type obligation to adduce witnesses regardless of their value to the prosecution case.<sup>266</sup> It was not part of the prosecutor’s function to resolve a dispute between apparently credible witnesses or to call witnesses who were more appropriately left to the defence to be called. Diplock LJ stated:

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<sup>261</sup> [1964] 2 All ER 610.

<sup>262</sup> As the case involved a civil action for false imprisonment the contributions of Lord Denning MR and Diplock LJ as to the prosecutor’s role in calling witnesses were unnecessary for the final decision.

<sup>263</sup> It is perhaps not coincidental that *Dallison v Caffery*, along with *Bryant and Dickson*, are also frequently taken as representing the starting point of the modern law on disclosure, see Chapter 5, n 97.

<sup>264</sup> [1964] 2 All ER 610 at 618.

<sup>265</sup> See above n 15. It is virtually impossible to reconcile the conflicting observations offered by Lord Denning MR and Diplock LJ, see *R v Mason* [1975] 2 NZLR 289 at 294 and *R v Lawson* (1990) 90 Cr App R 107 at 114.

<sup>266</sup> [1964] 2 All ER 610 at 622.

If he [the prosecutor] happens to have information from a credible witness which is inconsistent with the guilt of the accused, or although not inconsistent with his guilt is helpful to the accused, the prosecutor should make such witness available to the defence.<sup>267</sup>

[7.12.9] I would suggest that Diplock LJ’s formulation accords with the practical and adversarial reality of the criminal process.<sup>268</sup> Furthermore, the view of Diplock LJ is consistent with decisions such as *Woodhead*, *Edwards* and *El Dabbah* and with the historical approach taken in Australia. It is my argument that the approach of Diplock LJ marks the logical culmination of the balance of the historical authorities in both England and Australia on this issue. However, whether this approach would be followed in a modern context in either Australia or England was to prove an altogether different proposition. What was described by Lord Lowry CJ in *R v Mullan (No 2)*<sup>269</sup> as the “ancient conflict” of what prosecutorial role to apply in the calling of witnesses was to persist in both Australia and England.<sup>270</sup> The “lonely” and heavy” responsibility of the prosecution in its choice of witnesses was to remain unresolved.<sup>271</sup>

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<sup>267</sup> [1964] 2 All ER 610 at 622.

<sup>268</sup> This is subject to the crucial caveat that the defence are made aware of the necessary material to enable them to decide whether to calling the witness themselves, as was the situation in *R v Nicholson* (1936) 100 JPN 553. This issue will be explored at greater length in Chapter 10, especially Part 6.

<sup>269</sup> [1980] NIJB 10.

<sup>270</sup> This issue will be considered further in Chapters 8 (Australia) and 9 (England).

<sup>271</sup> See the discussion in Chapter 10 for a suggestion as to resolving this question.

# CHAPTER 8

## **THE PROSECUTOR'S MODERN ROLE IN CALLING WITNESSES IN AUSTRALIA: *PRO DOMINA VERITAE*: WELCOME REAFFIRMATION OR UNHELPFUL DISTRACTION?**

*A scrutiny of the modern Australian cases dealing with the prosecutorial role in calling witnesses reveals the same tensions and inconsistencies in approach that feature in both the historical and the modern English cases. This Chapter considers the modern development of the prosecutorial role in calling witnesses in Australia. The historical position had ultimately resolved the issue in favour of the adversarial role. Though the High Court appeared at one stage in R v Richardson to have confirmed this view, subsequent Australian decisions have not only retreated from this position, but have firmly adopted the minister of justice role. This line of authority, culminating in the High Court's decision in R v Dyers, places considerable restraints on the prosecution in its choice of witnesses. It is my argument that these authorities, notably Dyers, have misapplied what was a settled area of the law and unduly fetter the prosecution's discretion and fail to reflect the adversarial nature of the criminal process. It is timely to reconsider the present Australian position.*

### **Part 1 Introduction: *Pro Domina Veritae*?**

“That responsibility [of the prosecutor in calling witnesses] is to be discharged in accordance with the dictates of fairness. Fairness as a concept governing the actions and decisions of the prosecution provide little comfort to the individual prosecutor who alone and working at the coalface must make what can be a difficult and important decision in determining what witnesses to call in the presentation of the prosecution case. The prosecutor is better served in making such decisions to look for guidance in the role of the prosecution in the administration of justice. That role burdens the prosecutor when conducting the prosecution case in the pursuit of truth. That is, the jury must be put in the position where all reasonable hypotheses consistent with both guilt and innocence are raised and tested so that a verdict of guilt beyond reasonable doubt does not conflict with the truth of the matter to the extent it can be discerned by the jury. This necessitates that the jury must be privy to all available and admissible evidence

relevant to the determination of a fact in issue or a material fact irrespective of whether such evidence is consistent with the hypothesis promulgated by the prosecution...Minded of this, in making decisions as to what witnesses to call as part of the prosecution case the prosecutor should always consider her or himself retained *pro Domina Veritae*.”<sup>1</sup>

[8.1.1] This pronouncement by Hinton is an emphatic and considered reaffirmation of, what I have described in the previous Chapter, as the minister of justice role of the prosecutor in the calling of witnesses at trial. According to this view the prosecutor is left with a strictly limited discretion in his or her choice of witnesses. Hinton's view is illustrative of the approach that has been largely adhered to in Australia since 1983. Despite the changes in modern criminal procedure, notably the development of a modern comprehensive duty of disclosure (as discussed in Chapters 5 and 6), and the various pressures that are now brought to bear upon prosecutors, it is significant that the Australian courts, since 1983 at least, have resolutely resisted what I have described as the “adversarial” approach to the calling of witnesses. This is despite the fact that this was the approach that was ultimately adopted in both England and Australia historically as shown in the last Chapter and has been followed in modern times in jurisdictions such as Canada<sup>2</sup> and, on occasion, in England.<sup>3</sup> Whatever may be the precise state of the present law in England on this issue,<sup>4</sup> it will be seen that the courts in Australia have strongly emphasised the minister of justice approach to the prosecution's choice of witnesses at trial.

[8.1.2] It is my contention that the adoption of the minister of justice role in Australia, as stated by Hinton and, indeed, confirmed and extended by several decisions of the High Court of Australia, does not accord with the prior historical authorities from both England and Australia on this issue. As, may be recalled from Chapter 7, those authorities had ultimately rejected any obligation on the prosecution to call all the witnesses named on the back of the indictment and had sanctioned a wide degree of discretion in the prosecution in its choice of witnesses at trial. This adversarial role represented the settled law on this subject. It is my contention that the adoption of the minister of justice approach in calling witnesses is misguided and is not soundly based in precedent. The minister of justice approach also fails to reflect the adversarial realities of the criminal process and that this role has been overtaken by recent developments to criminal procedure, notably in relation to the prosecution's modern duty of disclosure.<sup>5</sup>

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<sup>1</sup> Hinton, Ch 7, n 12, 260. For those who share the author's ignorance of Latin, it may be recalled (see Chapter 2, n 7) that this expression originates from Queen Elizabeth 1 and translates broadly as “minister of truth.”

<sup>2</sup> See, for example, *R v Lemay* [1952] 1 SCR 232 and *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437. See further the discussion in Parts 2 and 3 of Chapter 10.

<sup>3</sup> See, for example, *R v Richardson* (1994) 98 Cr App R 174; *R v Taylor*, *The Times*, 11 December 1995 and *R v Bradish & Hall* [2004] EWCA Crim 1340. cf *State v Grant* [2007] AC 1 and *R v Armstrong* [1995] Crim LR 342. See further the discussion in Chapter 9.

<sup>4</sup> It is not easy to arrive at a clear and consistent view of the law in England on this issue, see the discussion in Chapter 9.

<sup>5</sup> See further the discussion in Parts 6 and 11 of Chapter 9 and Part 6 of Chapter 10.

## Part 2: No Clear Position

[8.2.1] The natural starting point to any consideration of the modern law in Australia as to the calling of witnesses by the prosecution is the important decision of the High Court in 1957 in *Ziems v the Prothonotary of Supreme Court of New South Wales*.<sup>6</sup> As *Ziems* is a civil case involving a challenge by a barrister to his removal from the Roll of Barristers following his conviction for manslaughter it is difficult to see at first glance the significance of this decision to the prosecution’s selection and calling of witnesses at trial. However, the High Court held in *Ziems* that the actual conviction itself was not necessarily decisive in considering whether the appellant should have been struck off and the court could have regard to all the circumstances lying behind the conviction. Therefore it was open to the High Court in *Ziems* to examine the circumstances of the original conviction, including the conduct of the prosecution at the trial.

[8.2.2] *Ziems* had been convicted at trial of manslaughter following a fatal road traffic accident. The prosecution case was that *Ziems* had driven erratically whilst heavily under the influence of alcohol. *Ziems* asserted that the accident had not been due to drink. He had not been intoxicated and had been suffering from shock and concussion a result of injuries sustained from an earlier fracas with a seaman. A particular issue arose concerning the evidence of a police sergeant called Phillis. He would have been an important witness at the trial as he had supported *Ziems*’ explanation. Though Phillis had been named on the indictment and had provided a deposition at the inquest the prosecution had refused to call him at trial with the result that the defence had been obliged to call him. Three of the members of the High Court commented on the absence of Phillis at trial as a prosecution witness and the obligations of the prosecution in its choice of witnesses at trial.<sup>7</sup> Dixon CJ briefly noted that the trial “was not altogether satisfactory” in that the sergeant had not been called by the prosecution and the defence had been compelled to call him.<sup>8</sup>

[8.2.3] Fullagar J considered this issue at greater length. His Honour commented:

It is difficult to imagine evidence of greater importance than that of Sergeant Phillis. Yet at the trial he was not called as a witness for the trial. One hesitates, of course, in a case in which the Crown is not represented, to comment adversely on this omission. But no sound explanation of his not being called by the Crown appears from his cross-examination (when he was called for the defence) or otherwise, and *prima facie* he ought to have been called by the Crown. There is, of course, no rule of law that a prosecutor must call every witness who is bound over and available. On the contrary, the discretion of the prosecutor has been recognised in many cases, and was recently asserted in *Adel Muhammed El Dabbah v Attorney-General for Palestine*. Any one of or more of a variety of

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<sup>6</sup> (1957) 97 CLR 279.

<sup>7</sup> Dixon CJ, Fullagar and Taylor JJ. McTiernan and Kitto JJ did not consider the issue. There is an argument that the High Court’s observations on the prosecutor’s discretion in calling witnesses were strictly *obiter* as they were unnecessary for the resolution of the main issue of whether *Ziems* should have been struck off. However, it would be a brave or foolhardy prosecutor who would disregard the persuasive views offered by the three judges of the High Court.

<sup>8</sup> (1957) 97 CLR 279 at 285. Though Phillis was called as a defence witness at the trial, the defence lost the tactical advantage of cross-examination and the favourable impact of his evidence was less than his deposition had indicated.

reasons may justify a prosecutor in not calling a witness who has given evidence for the Crown before the coroner or the magistrates, and I would not wish to say anything that might unduly limit his discretion. The present case, however, seems to me call for a reminder that the discretion should be exercised with due regard to traditional considerations of fairness.<sup>9</sup>

This observation reflects the familiar and ongoing tension between the prosecutorial roles of minister of justice and adversarial advocate in the calling of witnesses at trial.

[8.2.4] Fullagar J added that while the prosecution was not compelled to call every witness named on the back of the indictment, it was, nevertheless, usual for them to do so in order that the defence might cross-examine the witness. In the present case Phillis had not merely been a material witness, but was a witness of “vital importance.”<sup>10</sup> Fullagar J referred, with evident disapproval, both to the failure of the prosecution to call Phillis at trial and the apparent motivation for that decision:

So far, as appears, the only possible object of not calling him was to place the appellant under the tactical disadvantage which resulted from inability to cross-examine him. Such tactics are permissible in civil cases, but in criminal cases, in view of what is at stake, they may sometimes accord ill with the traditional notion of the functions of a prosecutor for the Crown. It is a very relevant factor here that the witness in question was a police witness, and a senior member of the force at that.<sup>11</sup>

[8.2.5] Taylor J speculated that the reason that the prosecution had not called Phillis could have been that his account did not accord with the prosecution case at trial that the accused had been unfit to drive through alcohol. Like Dixon CJ and Fullagar J, Taylor J also expressed unease at the prosecution's failure to call Phillis at the trial. His Honour noted that:

There may have been some legitimate reason why Sergeant Phillis was not called as a witness in the Crown case but if there was it does not appear. He was the one witness who could give evidence of a most material matter for the appellant himself could not. Moreover, he was a senior police officer and it was strange that, in the circumstances, it should have been left to the defence to call him.<sup>12</sup>

[8.2.6] Taylor J considered the previously quoted comments of the Privy Council in the leading case of *El Dabbah*<sup>13</sup> and went on to conclude that:

...the observations made in the later case [*El Dabbah*] in no way suggest that it is within the province of the prosecutor to refrain from calling a witness whose evidence is quite plainly material.<sup>14</sup> No doubt, in some cases, there may be special reasons, which will

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<sup>9</sup> (1957) 97 CLR 279 at 292.

<sup>10</sup> (1957) 97 CLR 279 at 294.

<sup>11</sup> (1957) 97 CLR 279 at 294. The final comment of Fullagar J accords with the unwritten rule of etiquette that the prosecution, and not the defence, should call police officers at trial. See further Chapter 9, n 198.

<sup>12</sup> (1957) 97 CLR 279 at 307. Taylor J was also conscious of the unwritten rule regarding who should call a police witness.

<sup>13</sup> *El-Dabbah v Attorney-General of Palestine* [1944] 2 All ER 139.

<sup>14</sup> With respect to the view of Taylor J it is apparent that *El Dabbah* did, in fact, accord such a discretion to the prosecutor in his or her choice of witnesses and that case explicitly recognised the prosecutor's “adversarial” role, see further the discussion in Part 8 of Chapter 7.

justify the prosecution in discarding a particular witness but no such reason appears in this case. It is, perhaps, possible that if the Crown had been represented in this case some reason, not otherwise apparent, might have been advanced but there can be no question that the evidence of Sergeant Phillis was of the utmost materiality and if it had been fully available to the jury it is possible that the trial may have ended differently.<sup>15</sup>

[8.2.7] The majority of the High Court (Fullagar, Kitto and Taylor JJ; Dixon CJ and McTiernan J dissenting) ultimately allowed *Ziems*’ challenge and altered his order of removal to one of suspension. It is significant that both Fullagar and Taylor JJ were influenced in reaching this conclusion by both the evidence of Phillis and the fact that his account had not been adduced by the prosecution at the trial.

[8.2.8] The significance of *Ziems*, especially in Australia, as to the scope of any “duty” on the prosecutor in calling witnesses cannot be dismissed. But it is ultimately inconclusive. Only Fullagar and Taylor JJ offered any real contribution to the issue of the prosecution’s obligations in calling witnesses. Despite their evident unease at the failure of the prosecution to call Phillis, both judges did not unequivocally endorse either the minister of justice or the adversarial role for the prosecution in the calling of witnesses. Rather both judgments reflected the ongoing tensions between those roles in their observations. Even the detailed comments of Fullagar J, when considered in their entirety, were, in the considered view of the High Court in 1974 in *R v Richardson*,<sup>16</sup> not intended to enunciate any rule of law that would have fettered the wide discretion of the prosecutor and compelled it to call particular witnesses.<sup>17</sup> Nevertheless, the effect of the *Ziems*, inconclusive though it was on close scrutiny, was to inject a note of uncertainty into what had been, as asserted in the last Chapter, an apparently settled area of the law. This uncertainty is reflected in the various decisions taken at a State level in Australia during the 17 years between *Ziems* and the next occasion when the High Court returned to the prosecutor’s role in calling witnesses in *R v Richardson and Others*<sup>18</sup> in 1974. These State decisions are inconsistent and difficult to reconcile. They reflect the familiar tension between the prosecutorial roles of adversarial advocate and minister of justice in the selection and calling of witnesses at trial. Certain of those decisions emphasise what might be termed the minister of justice role<sup>19</sup> whilst others appear to recognise the adversarial nature of the prosecutor’s position in the criminal process and sanction a wide degree of discretion to the prosecutor in his or her choice of witnesses.<sup>20</sup> Illustrative of the inconsistency in this period are the cases of *R v Evans*<sup>21</sup> in 1965 and *R v Lucas*<sup>22</sup> in 1973.

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<sup>15</sup> (1957) 97 CLR 279 at 308.

<sup>16</sup> (1974) 131 CLR 116.

<sup>17</sup> (1974) 131 CLR 116 at 121. I would concur with the High Court’s assessment of Fullagar J’s remarks.

<sup>18</sup> (1974) 131 CLR 116.

<sup>19</sup> See *R v Lawson* [1960] VR 37; *R v Norwood*, unreported Supreme Court of Western Australia, No 413 of 1970, Jackson CJ (discussed at (1971) 10 UWA L Rev 173) and *R v Cushway* (1968) 62 QJPR 90.

<sup>20</sup> See *R v Evans* [1964] VR 717 and *R v Eastwood & Boland* [1973] VR 709.

<sup>21</sup> [1964] VR 717.

<sup>22</sup> [1973] VR 693.



[8.2.9] In *Evans* the accused had been convicted of fraud. The issue on appeal was whether a man called Sykes should have been called as a witness at the trial by either the prosecution or the trial judge. The Full Court of the Supreme Court of Victoria had no hesitation in dismissing the appeal. There was no basis for the trial judge to have called Sykes.<sup>23</sup> In relation to the wide discretion of the prosecutor to call his or her own witnesses at trial as he or she saw fit the court was clear:

We think it is clearly established by the highest authority that a prosecutor is not bound to call any person as a witness whether his name is endorsed on the presentment or not and a direction [from the trial judge] such as that which it is claimed should have been given to call Sykes as witness would have been ineffective. It still would have been a matter for the discretion of the prosecutor whether to call him or not.<sup>24</sup>

The court relied on two of the cases discussed in Chapter 7 in support of this proposition.<sup>25</sup>

[8.2.10] On the other hand in 1973 in *R v Lucas* the Full Court of the Supreme Court of Victoria arrived at a different position. The accused in this case had been convicted of “culpable driving” arising from a fatal road traffic accident. The prosecution had been in possession of accounts from two independent and credible witnesses, Leeton and Woods, to the accident. These accounts had differed sharply. While Leeton had incriminated the accused, Woods had supported the explanation of the accused as to the cause of the accident.<sup>26</sup> The trial had proceeded without the important testimony of Woods. This was despite the fact that the prosecution had expressly agreed with the defence some time prior to the trial to subpoena Woods to give evidence. Woods was unavailable at the time of the trial as he was temporarily in Queensland and the subpoena had never been served. Though the prosecution were clearly aware that Woods would be absent from the trial, they had made no effort to communicate this vital information to the defence, either prior to, or even at, the actual trial. At the trial the defence had been effectively denied, by both the prosecution and the trial judge, any opportunity to call Woods as a defence witness. The prosecution had presented their case, and the trial had proceeded, upon the basis that the only independent evidence of the accident was from Leeton and he had incriminated the accused and undermined his version of events.

[8.2.11] In these circumstances on appeal it is not surprising that the court considered that the absence of Woods at the trial had amounted to a “substantial miscarriage of justice.”<sup>27</sup> However, the court did not confine their reasoning to the particular facts of the case. Though Woods had not been called at the inquest, and his name had not been “on the back of the indictment,” the court considered that the “obligations of fairness”

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<sup>23</sup> The court noted that the trial judge had concluded, as the prosecutor had asserted, that Sykes’ evidence was both immaterial and potentially unreliable.

<sup>24</sup> [1964] VR 717 at 719.

<sup>25</sup> It is noteworthy that the court cited *El Dabbah* and *Dallison v Caffery* [1964] 2 All ER 610 at 622 per Diplock LJ in support of their proposition. These are some of the leading authorities in favour of the wide “adversarial” approach in calling witnesses, see further the previous discussion in Chapter 7.

<sup>26</sup> Lucas asserted that the accident had been the fault of assailants in a Cortina chasing his own vehicle with hostile intent.

<sup>27</sup> [1973] VR 693 at 698 per Smith ACJ. The conviction was quashed and a retrial ordered.

attached to the prosecution in criminal proceedings and the prosecutor’s special role in the calling of witnesses rendered it necessary for the prosecution to have called a witness such as Woods at the trial.<sup>28</sup> Smith ACJ explained that Woods “was an apparently credible eye-witness to the homicide charged and his story was necessary to complete the story of the relevant events.”<sup>29</sup> The prosecution had only a limited discretion not to call a material witness. Smith ACJ noted that the prosecution might only properly exercise its discretion not to call a relevant witness “when it has strong and satisfactory reasons for doing so, as for example when the witness is clearly untruthful or unreliable.”<sup>30</sup> The role of the prosecutor in his or her choice of witnesses at trial was that of a minister of justice. As Smith ACJ explained:

... it has long been established that a prosecution must be conducted with fairness towards the accused and with a single view to determining and establishing the truth... The rule that the prosecution ought to have in court all witnesses whose names are on the back of the presentment is merely one application of this established general principle, and rests upon the view that an accused person may be taken by surprise should any of those witnesses not be brought to court, since the naming of them is calculated to cause him to assume that the Crown will have them there...

The Crown’s duty to act with fairness and with the single aim of establishing the truth, denies it the right to pick and choose as between independent and apparently credible witnesses for merely tactical reasons, such as a desire to be able to cross-examine those who are unfavourable, or less favourable than others, to the Crown case: or a desire to force the defence to call evidence and thereby lose the right of the last address. Whether or not their names appear on the back of the presentment, all those witnesses whose testimony is necessary to put before the court the complete story of the events on which the prosecution is based ought in general to be called by the Crown. And in particular all eye-witnesses to the doing of the acts charged as criminal ought to be called.<sup>31</sup>

[8.2.14] A similar view to that of the Acting Chief Justice was expressed by the remaining members of the court, Newton J and Norris JA. Their Honours noted that it was “very well established” that both prosecution counsel at trial and all those involved in the preparation of the Crown case for trial had to act in the lofty role as a minister of justice.<sup>32</sup> They elaborated:

One example of those general principles regarding the duties of prosecution counsel and those assisting them is to be found in the special rules of practice which have been developed regarding the duties of the Crown in relation to witnesses who have been examined at the committal proceedings and whose names are, therefore, endorsed on the back of the presentment... The substantial effects of those rules is the Crown must, if practicable, have all such witnesses in court at the trial, and that while the Crown has a

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<sup>28</sup> [1973] VR 693 at 706 per Newton J and Norris AJ.

<sup>29</sup> [1973] VR 693 at 698. There was no reason to question either the honesty or reliability of Woods. Indeed, prosecution counsel on appeal “candidly admitted that Woods was a completely independent witness and that there was no reason to suspect any ulterior motive for his statement” supporting the account of the accused [1973] VR 693 at 703.

<sup>31</sup> (1974) 131 CLR 123. Barwick CJ and McTiernan and Mason JJ gave a joint judgment

<sup>30</sup> [1973] VR 693 at 697.

<sup>31</sup> *R v Lucas* [1973] VR 693 at 696-697 citing many of the minister of justice cases discussed in Chapter 7.

<sup>32</sup> [1973] VR 693 at 705.

discretion as to the calling of such witnesses, the discretion must be exercised with due regard to the considerations of fairness which prosecuting counsel are bound to observe, so that all such witnesses should be called by the Crown, notwithstanding that their evidence may tell in favour of the accused, save for witnesses who cannot be made available or whose evidence the Crown considers on reasonable grounds to be unreliable...<sup>33</sup>

[8.2.15] *Lucas* is explicable by its particular facts. Given that the prosecution had not only reneged on its agreement to call Woods but had also acted to thwart the defence from having any opportunity to call him, it could be asserted that it was actually unnecessary for the court to have expressed any view, especially in such strong minister of justice terms, about the prosecutor's duty in calling witnesses. On any view the prosecution's questionable conduct in *Lucas* had denied the accused a fair trial.<sup>34</sup> Be that as it may, *Lucas* must be regarded as an emphatic authority in favour of the prosecutorial role as a minister of justice in this area.

### **Chapter 3: *R v Richardson* and Subsequent Cases: Reaffirmation of the Adversarial Approach: An Overlooked Line of Authority?**

[8.3.1] In 1974 the High Court in *Richardson* had occasion to revisit the prosecutorial role in calling witnesses. It may have been hoped that the High Court might have resolved the ongoing and longstanding debate as to the precise discretion, or lack of, on the part of the prosecution in its choice of witnesses at trial. Though *Richardson* ultimately was not to resolve the law, it is clear that *Richardson* is, nevertheless, of crucial importance in Australia in considering the nature and extent of the prosecution's responsibilities in calling witnesses.

[8.3.2] Several assailants, in the course of what might now be termed as a "road rage" attack, had taken part in a "vicious and unprovoked assault on a police officer in the execution of his duty."<sup>35</sup> A man called Keith Dickinson had been convicted at trial. His brother, Colin, had been acquitted. Keith appealed his conviction. There was a female witness to the attack called Dawn Gardiner. She had been in a car with one of the assailants and was an associate of his.<sup>36</sup> Gardiner was called as a prosecution witness at committal and her account incriminated the other assailants but suggested that the two Dickinson brothers had not been involved in the attack. The Magistrate was unimpressed with Gardiner's testimony and had commented that he had found her a "not very convincing witness [and] that a very real issue arises as to her credibility."<sup>37</sup> It seemed that Gardiner had even goaded Dickinson during the attack to "get" the police officer.

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<sup>33</sup> [1973] VR 693 at 706.

<sup>34</sup> In this sense *Lucas* can be compared with similar cases in England that, while correct in their conclusions in their particular facts, unnecessarily invoked the prosecutor's minister of justice role in reaching their decisions. See further the discussion in Part 3 of Chapter 9.

<sup>35</sup> (1974) 131 CLR 116 at 123. *Richardson* and the other appellant only appealed their sentences, not the verdict.

<sup>36</sup> (1974) 131 CLJ 116 at 118. This assailant had admitted his involvement and pleaded guilty.

<sup>37</sup> (1974) 131 CLR 116 at 119.

[8.3.3] Faced with such a damning indictment of her credibility, prosecution counsel at trial refused to call Gardiner. As Justice Shepherd noted extra judicially, “She was far too much a member of the accused’s camp.”<sup>38</sup> Though Gardiner was available as a witness at trial as she had attended court in answer to a subpoena, the prosecutor indicated that if the defence wished her testimony to be adduced then it was for them to call her as a defence witness. Keith Dickinson’s counsel protested and insisted that the prosecutor should call Gardiner. The prosecutor remained unmoved and the trial judge refused to intervene.

[8.3.4] On appeal to the High Court counsel for Keith Dickinson contended that Gardiner should have been called at trial by the prosecutor. Counsel submitted that the prosecutor is required to call any witness who could testify as to the circumstances giving rise to the offence charged and that includes any witness, whether his or her testimony “tends to inculcate or exculpate the accused.”<sup>39</sup> This proposition was rejected by the High Court. In reaching their conclusion the High Court reflected, perhaps unwittingly, the longstanding and conflicting prosecutorial roles in the calling of witnesses between allowing the prosecution the broad discretion to call those witnesses that it wished to call while at the same time promoting and ensuring fairness to an accused. The High Court observed:

Any discussion of the role of the Crown prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine which witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to determine what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused...what is important is that it is for the prosecutor to decide in the particular case ... and to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused...<sup>40</sup>

[8.3.5] The High Court went on to emphasise that it was a “misconception” to speak of the prosecutor being under a “duty” to call all material witnesses.<sup>41</sup> This “misconception” had arisen as a result of elevating to a rigid proposition and the prescription of an inflexible duty some observations in the decided cases that had been purely intended to offer guidance to prosecutors in how they were to discharge their function in calling witnesses.<sup>42</sup> The High Court made clear its disfavour of such a prescriptive approach. While the “pursuit of certainty may have its advantages,” they noted that “the rigid circumscription of a practical decision to be made by the Crown Prosecutor in the conduct of the Crown case is not to be numbered among them.”<sup>43</sup> The High Court noted that any such inflexible proposition was neither helpful nor supported by the past authorities. The previous judicial comments suggesting the existence of any such duty were not intended to lay down any rule of law and were not intended to inhibit the

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<sup>38</sup> Shepherd, Ch 7, n 34, 242.

<sup>39</sup> (1974) 131 CLR 116 at 119.

<sup>40</sup> (1974) 131 CLR 116 at 120.

<sup>41</sup> (1974) 131 CLR 116 at 120.

<sup>42</sup> (1974) 131 CLR 116 at 120.

<sup>43</sup> (1974) 131 CLR 116 at 120.

ordinary discretion of the prosecutor. It is wrong to enunciate rules to fetter the discretion of the prosecutor in the selection of witnesses and the prosecutor did not owe any duty to the accused in the calling of witnesses.<sup>44</sup> The court noted that there had been a “tendency to overlook” what had been stated by the Privy Council in *El-Dabbah* and there was to be found in that crucial case, “an accurate and comprehensive statement of the function of the Crown prosecutor.”<sup>45</sup>

[8.3.6] In *Richardson* it was plain to the High Court that Gardiner was not a credible or reliable witness and it was equally plain that no dictate of fairness could have compelled the prosecution to call her.<sup>46</sup> It was for the defence to call her. But it is important to appreciate, especially in light of subsequent Australian authority, that the High Court were at pains in *Richardson* to emphasise that the unreliability or untruthfulness of a potential witness is merely one example of the many circumstances in which the prosecutor could be justified in exercising his or her broad discretion and refuse to call that witness. As the court observed:

In making his decision as to the witnesses who will be called he [the prosecutor] may be required in a particular case to take into account many factors, for example whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible or truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few.<sup>47</sup>

[8.3.7] *Richardson* is a vital decision. But it is, oddly I would suggest, a case that has consistently either been ignored or misapplied. Subsequent cases have often been guilty of selective quotation and have tended to adopt the passage quoted above reminding prosecutors to bear in mind the “dictates of fairness to the accused,” while conveniently ignoring the crucial remainder of the decision.<sup>48</sup> *Richardson* serves as an explicit and considered rejection of the minister of justice approach to the calling of witnesses. While the prosecution could not disregard the need to be mindful of the interests of the accused, *Richardson* did afford a broad degree of discretion to the prosecution in its choice and calling of witnesses. It should have settled in Australia the longstanding uncertainty arising from the previous decisions as to the prosecutor’s discretion to call witnesses.<sup>49</sup>

[8.3.8] *Richardson*, along with such other landmark cases as *Woodhead*, *Cassidy* and *El Dabbah* (all of which were referred to with approval in *Richardson*) are powerful authorities in this area in favour of the adversarial role of the prosecutor in the calling of witnesses. Aronson suggests that *Richardson* even exceeds *El Dabbah*, which “used to be regarded as the high-water mark of prosecution discretion,” and the High Court had apparently even discarded Lord Thankerton’s caveat to the prosecution’s wide discretion

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<sup>44</sup> This same point was also forcefully made by the Supreme Court of Canada in the decision of *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437. See further the discussion in Part 3 of Chapter 10.

<sup>45</sup> (1974) 131 CLR 116 at 120. The Privy Council’s comments were previously discussed in Part 8 of Chapter 7.

<sup>46</sup> (1974) 131 CLR 116 at 122.

<sup>47</sup> (1974) 131 CLR 116 at 119. The High Court later repeated that the unreliability of a witness was not the exclusive test and was merely an “example” of the circumstances in which a witness need not be called (1974) 131 CLR 116 at 121.

<sup>48</sup> See, for example, *R v Armstrong* [1998] 4 VR 533 at 537.

<sup>49</sup> See the acknowledgement of this point by Lane (1981), Ch 5, n 252, 263-264.

that it should not act with an oblique motive.<sup>50</sup> *Richardson* cannot be reconciled with the minister of justice pronouncements in the historical cases such as *Harris* and *Treacy* or a later case such as *Lucas*<sup>51</sup> as to the scope of the prosecution’s duty in calling witnesses. Aronson and Brown observe that *Richardson* also cannot stand with the minister of justice suggestion of Lord Roche in *Seneviratne* that the prosecution should call all witnesses “essential to the unfolding of the narratives on which the prosecution is based,” regardless of whether such evidence supports or undermines the prosecution case.<sup>52</sup> Aronson considers that the High Court read *Seneviratne* as not establishing any legal rule as to the prosecutor’s discretion and, “The matter, the court seemed to say, is entirely up to the prosecutor.”<sup>53</sup> Brown agrees:

In crude terms the High Court was qualifying Lord Roche’s dictum to the extent of virtually dissenting from it. It put the onus on the defendant to call a witness not called by the prosecution.<sup>54</sup>

[8.3.9] Though Aronson and Brown are critical of the conclusion of the High Court in *Richardson*, I would suggest that, as will be discussed in Chapter 10, not only did *Richardson* formulate the correct approach but that Brown has identified the solution to the issue of who should call what witness by firmly placing the onus upon the defence the decision to call a witness not called by the prosecution. Once the defence has been furnished with the details and account of a potential witness then, as was suggested in *R v Nicholson*<sup>55</sup> by Hawk J, the onus is properly on the defence to call that witness if they so want. It should not be for the prosecution to call such a witness.

[8.3.10] An even more emphatic judicial pronouncement in favour of the adversarial prosecutorial role in the calling of witnesses was expressed only several months after *Richardson* by the Supreme Court of South Australia (in *Banco*) in the decision of *Re: Van Beelen*.<sup>56</sup> At issue in this case, relevant in the present context,<sup>57</sup> was whether the prosecution should have called, at either the preliminary examination or at the trial, four witnesses at the scene of the crime (the “wharfingers”), or a man called Sandercock, or the police officer who had investigated the purported “confession” to the murder with which the accused had been charged. This material did not support the prosecution case. Prosecution counsel at trial had been unaware of these witnesses but the law officers involved in the preparation of the case for trial had been aware of them. The views of the

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<sup>50</sup> Aronson, Ch 7, n 177, 153.

<sup>51</sup> See KMH, “Criminal Law and Procedure – Presentation of Crown Case – Duty of Crown with Respect to calling Witnesses – Fairness to Accused” (1974) 48 ALJ 497 at 498 where it was acknowledged that while *Lucas* seemed to impose a higher duty on prosecutors in calling witnesses than had *Richardson* the result in *Lucas* “was on the whole reconcilable” with *Richardson*. This view accords with my interpretation of *Lucas*.

<sup>52</sup> *R v Seneviratne* [1936] 3 All ER 36 at 49. Though it must be recalled that this comment was heavily qualified by the “adversarial” comment immediately preceding it, see the discussion in Part 7 of Chapter 7.

<sup>53</sup> Aronson, Ch 7, n 177, 151. Aronson notes that Lord Roche’s dictum may have only been a “moral” rule and not intended to fetter the prosecution’s discretion. See *Ibid*. See further the discussion in Part 7 of Chapter 7.

<sup>54</sup> Brown, Ch 2, n 220, 374. It should be noted that Hinton disagrees with Brown’s view (and by implication Aronson’s view) and argues that *Richardson* is consistent with *Seneviratne*, see Hinton, Ch 7, n 12, 263.

<sup>55</sup> (1936) 100 JPN 553. See further the earlier discussion in Part 6 of Chapter 7.

<sup>56</sup> (1974) 9 SASR 163.

<sup>57</sup> *Van Beelen* also considered the issue of disclosure, see Part 4 of Chapter 5 at [5.4.4].

court were clear. The High Court's decision in *Richardson* was applied. At both the committal proceedings<sup>58</sup> and at the trial the prosecution possessed a very wide discretion in its choice of witnesses and the court would not lightly interfere with the exercise of that discretion. In relation to the prosecutor's discretion at trial the court offered the following observations:

It is our opinion that the discretion residing in the Crown Prosecutor as to whether or not a particular witness should be called by him at the trial is no less extensive than that which obtains in relation to the calling of witnesses at a preliminary stage. And it seems that the discretion need not necessarily be exercised by counsel prosecuting at the trial, but that it may properly reside in the law officers of the Crown who have the duty of instructing the prosecuting counsel. The opinion of responsible and experienced law officers that a witness ought not properly be called for the Crown because the witness is incapable of giving evidence relevant to the vital facts in issue, or because the witness is likely to mislead the jury, or to deflect the jury from its function of trying the issues raised by a criminal adversary procedure, ought not lightly to be cast aside.<sup>59</sup>

[8.3.11] The significance of these observations lies not only in the court's robust support for the "adversarial" role of the prosecutor in calling witnesses but also in its indication that the appropriate decision as to what witnesses should be called by the prosecution at trial need not be made by trial counsel but can be properly left to any law officers responsible for instructing prosecution counsel at trial.<sup>60</sup> This is an important practical acknowledgement by the court as in both England and some Australian jurisdictions, such as New South Wales and South Australia, it is ordinary practice for someone other than the trial advocate to be responsible for preparing the prosecution case for trial and the selection of the witnesses who will be called at trial by the prosecution.<sup>61</sup>

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<sup>58</sup> This view accords with that taken in the historical cases confirming the prosecution's broad discretion in its selection of witnesses at committal and rejecting any obligation to adduce any material witness at committal, see the discussion in Part 11 of Chapter 7. This "adversarial" view has been followed in modern times in England. The English position is that as a preliminary hearing serves simply to establish whether there is a prima facie case against the accused and is not to be used for other purpose, the prosecution has a very wide discretion in its choice of witnesses at committal and is entitled to refuse to call a material witness, even the victim of the alleged offence, see *R v Epping and Harrow Justices, ex parte Massaro* [1973] 1 All ER 1011, *R v Grays Justices, ex parte Tetley* (1980) 70 Cr App R 11 and *Wilkinson v Crown Prosecution Service* (1998) 162 JP 591. Though the English position has found some "modern" Australian support (see *Summers v Cosgriff* [1979] VR 564 at 568, *R v Grant-Taylor, ex parte Johnson* [1980] Qd R 387 and *R v Harry, ex parte Eastway* (1985) 39 SASR 203 at 214-216 per O'Loughlin J dissenting) the balance of modern Australian authorities have taken a different view and hold that the committal procedure serves wider purposes, including providing an opportunity to inform the defence of the prosecution case, see *R v Barton* (1980) 147 CLR 75 at 99-100 per Gibbs CJ and Mason J and 105-106 per Stephen J and *R v Harry, ex p Eastway* (1985) 39 SASR 203 at 211-212 per King CJ. The balance of modern Australian authority has extended the prosecution's minister of justice role to its choice of witnesses at committal, see *R v Harry, ex parte Eastway* (1985) 39 SASR 203 at 211-212 per King CJ and 214 per Milhouse J, *R v Walden* (1986) 41 SASR 421 at 426-427 per Zelling ACJ and 429-431 per Milhouse J, *R v Sloan* (1988) 32 A Crim R 366, *R v Basha* (1989) 39 A Crim R 337 at 340-341, *Houston v Grannage* (1989) 42 A Crim R 446 and *Fuller v Field* (1995) 78 A Crim R 211.

<sup>59</sup> (1974) 9 SASR 163 at 248.

<sup>60</sup> The court in *Van Beelen* had greater confidence in the ability of the instructing law officers to prepare the Crown case for trial properly and select the appropriate witnesses than that expressed by the trial judge in the English case of *R v Taylor, The Times*, 11 December 1995. See further the discussion in Chapter 9, n 213.

<sup>61</sup> It is not possible here to provide a detailed consideration of the operation of the various prosecution agencies in Australia and England, see the discussion in Part 2 of Chapter 1 at [1.2.7]-[1.2.11]. Briefly in England the practice

[8.3.12] The court did acknowledge in *Van Beelen* that the prosecutor’s broad “adversarial” discretion was not completely unchecked. It was qualified by four rules of practice (which have been discussed elsewhere)<sup>62</sup> requiring the prosecution to furnish to the defence the evidence of any additional witness not relied upon at committal;<sup>63</sup> to secure, in the absence of “strong and satisfactory reasons to the contrary,”<sup>64</sup> the attendance at trial of any witnesses named on the back of the indictment whom the prosecution chooses not to call in order that the defence might call them if they so wish;<sup>65</sup> to provide the defence with the particulars, though not the actual statement, of any witness whom the prosecutor chooses not to call but who could, nonetheless, give material evidence so that the defence could call him or her at trial if they wish<sup>66</sup> and to either call a credible witness who tended to show the innocence of the accused or make his or her statement available to the defence.<sup>67</sup>

[8.3.13] These rules of practice are comparatively unexacting, especially when viewed in a modern context, and do not greatly circumscribe the discretion of the prosecution to present its case at trial as it sees fit. It is clear that the court in *Van Beelen* categorically rejected any “minister of justice” notion that would constrain the discretion of the prosecution in its choice of witnesses. The court further explained that even if, contrary to its views, the prosecution were constrained by a general obligation to call at trial every material witness “circumstances could readily be conceived in which the Crown would be justified in not calling a particular witness.”<sup>68</sup> The court noted that the comments of Diplock LJ in *Dallison v Caffery* emphasising the adversarial nature of the prosecutor’s discretion in deciding what evidence to place before the court were “entirely consistent”<sup>69</sup> with *Richardson*. In short the prosecutor’s “duty is to prosecute, not to defend.” In such circumstances the court concluded that the decision of the law officers not to lead the evidence concerning the wharfingers and Sandercock as part of the

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is (though less now) for a lawyer, or even a legally unqualified caseworker, at the CPS to be responsible for preparing the Crown case for trial and choosing what evidence the Crown will adduce before sending the case for trial to a barrister not employed by the CPS (though in a complex case the CPS might well liaise with trial counsel). In some Australian jurisdictions a broadly similar procedure is followed though the “instructing” law officer at the DPP’s office will send the case for trial to the specialist advocate who is employed by the DPP, notably the Crown Prosecutors in New South Wales, Queensland or Victoria. In a smaller jurisdiction such as South Australia it is more likely that the trial advocate will be involved in the pre-trial preparation and selection of any witnesses to be called and one lawyer might even be responsible for both the preparation of the case for trial and the conduct of the actual trial. See further the discussion in Chapter 1 at [1.2.9].

<sup>62</sup> See the discussion in Part 4 of Chapter 5.

<sup>63</sup> See *R v Greenslade* (1870) 11 Cox CC 412 and *R v Devenish* [1969] VR 737. See further Part 2 of Chapter 5.

<sup>64</sup> (1974) 9 SASR 163 at 248.

<sup>65</sup> See *R v Woodhead* (1847) 2 Car & Kir 520 and *R v Cassidy* (1858) 1 F & F 79. See further the discussion in Part 4 of Chapter 7.

<sup>66</sup> *R v Bryant & Dickson* (1946) 31 Cr App R 146.

<sup>67</sup> See the view of Lord Denning MR. in *Dallison v Caffery* [1965] 2 All ER 610 at 618 as discussed in Part 12 of Chapter 7. The Supreme Court in *Van Beelen* made a valiant effort to reconcile the conflicting dicta of the Master of the Rolls and Diplock LJ in *Dallison v Caffery* [1964] 2 All ER 610 at 622, see further Chapter 7, n 265.

<sup>68</sup> (1974) 9 SASR 163 at 249.

<sup>69</sup> (1974) 9 SASR 163 at 249.



prosecution case had involved no “error of judgment” on their part and had been both “responsible” and “proper.”<sup>70</sup>

[8.3.14] At least one member of the High Court in *R v Lawless*<sup>71</sup> in 1979 expressed a similar “adversarial” view. It may be recalled<sup>72</sup> that the prosecutor at trial had not only withheld from disclosure to the defence the unhelpful (to the prosecution) statement of the “unused” witness, Mrs. Telford, but had also failed to call her at the trial. Mrs. Telford was a direct eye witness but had contradicted the evidence of the crucial prosecution witness. There was no suggestion that Mrs. Telford was dishonest or that her evidence was manifestly unreliable.<sup>73</sup> Prosecution counsel at the High Court conceded “that Mrs. Telford was an honest person and likely to endeavour to tell the truth so far as she was able.”<sup>74</sup> Rather the prosecution seem to have decided not to call Mrs. Telford at trial on the basis that she had made a genuine error and her account was simply wrong in parts.<sup>75</sup> Though the reasoning of the prosecutor was understandable, it might be thought that it was, nonetheless, incumbent upon the prosecutor to call Mrs. Telford as a prosecution witness at trial upon an application of the minister of justice role of the prosecutor in calling witnesses. After all, the fact that Mrs. Telford’s account contradicted that of the key prosecution witness would not have removed from the prosecution its obligation to call her at trial in view of cases such as *R v Lucas*.<sup>76</sup> This issue, perhaps surprisingly, did not feature prominently in the decision of the High Court. There was no suggestion by any member of the court, even Murphy J,<sup>77</sup> that the prosecution had been amiss in not calling Mrs. Telford as a prosecution witness at the trial. Only Barwick CJ gave the issue any direct consideration. The Chief Justice was clear in his view of the prosecutor’s role in calling witnesses:

... I ought to say first, that it was a matter for him [the prosecutor] to decide which witnesses he should call for the prosecution. I cannot see, for myself, any reason why he should have called Mrs. Telford particularly as the applicant’s defence was an alibi and Mrs. Telford could not aid in establishing the applicant’s presence at the scene.<sup>78</sup>

[8.3.15] *Lawless* provides further support, albeit partial, of the adversarial role of the prosecutor as had been expressed so explicitly and authoritatively in *Richardson* and *Van Beelen*. As at 1979, the more authoritative position in Australia, despite contrary suggestions in cases such as *Lucas*, was to recognise the prosecution’s wide discretion

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<sup>70</sup> (1974) 9 SASR 163 at 248.

<sup>71</sup> (1979) 142 CLR 659.

<sup>72</sup> The circumstances of *Lawless* have been previously dealt with in Part 7 of Chapter 5 at [5.7.3].

<sup>73</sup> Unlike the patently unreliable witness in *R v Richardson* (1974) 131 CLR 116. See also *R v Lawson* confirming the proposition that the prosecution, even on an application of the minister of justice role, need not call a grossly unreliable or untruthful witness [1960] VR 37 at 40.

<sup>74</sup> (1979) 142 CLR 659 at 665.

<sup>75</sup> Mrs. Telford had not given evidence at committal and was not named as a prosecution witness.

<sup>76</sup> See also the influential English decision of *R v Oliva* [1965] 3 All ER 116 that also requires the prosecution to call a material and credible but inconvenient witness such as Mrs. Telford. See further Part 2 of Chapter 9.

<sup>77</sup> Murphy J was critical of the prosecution’s failure to have furnished Mrs. Telford’s statement to the defence. See the previous discussion in Part 7 of Chapter 5 at [5.7.8].

<sup>78</sup> (1979) 142 CLR 659 at 667.

and to reject any “minister of justice” duty in the calling of witnesses. Within comparatively modest dictates the prosecution was free to prove its case at trial as it saw fit. The historical cases such as *El Dabbah* and *Woodhead* accurately stated the law in Australia.

#### **Part 4: *R v Whitehorn* Onwards: Retreat from the Adversarial Approach?**

[8.4.1] However, in *R v Whitehorn*<sup>79</sup> in 1983, the next major decision of the High Court on this point, a different view was expressed. The accused in this case had been convicted of the indecent assault of his seven year-old niece. The child had not been called to give evidence by the prosecutor at the trial. The reason for this was never made entirely clear but seems to have arisen from the fact that the tender age and limited comprehension of the alleged victim indicated that “she would not be of any use as a witness” and that “she would not have been capable of giving evidence.”<sup>80</sup> The only evidence against Whitehorn took the form of a disputed confession. There were real doubts as to whether the child’s original belated complaint of the incident had identified Whitehorn as the culprit and there were suspicions that another man may well have been the perpetrator.<sup>81</sup> The majority of the judges, Gibbs CJ and Brennan and Murphy JJ, were able to deal with the appeal on these grounds without any consideration of the prosecution’s responsibilities in calling witnesses. Gibbs CJ and Brennan J agreed with the assessment of Dawson J that the verdict of the jury was “unsafe” and could not be supported having regard to the paucity of the evidence against Whitehorn.<sup>82</sup> Murphy J reached the same conclusion as Deane J that the facts of the case had amounted to a “miscarriage of justice”<sup>83</sup> as the accused had been prevented through the absence of the child’s testimony at trial from being able to challenge the prosecution case.

[8.4.2] On the facts of *Whitehorn* these conclusions are hardly surprising. Whether the case is categorised as one where the court possessed a “lurking doubt” on the evidence about Whitehorn’s guilt<sup>84</sup> or whether the verdict was “unreasonable or is not supported by the evidence,”<sup>85</sup> the weakness of the prosecution case in *Whitehorn* was such that it was likely that any conviction would have been quashed. However, Deane J and Dawson J in the course of their judgments made detailed observations in relation to the nature of the prosecutorial role, especially in the choice and calling of witnesses at trial. These observations have subsequently proved to be of great persuasive authority in the development of the law.<sup>86</sup>

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<sup>79</sup> (1983) 152 CLR 657.

<sup>80</sup> (1983) 152 CLR 657 at 662. Such concerns are not uncommon in practice.

<sup>81</sup> The child had identified the perpetrator of the assault as “Skinny Guts.” The accused was not known by this name but three witnesses testified for the defence that the father of the child was.

<sup>82</sup> (1983) 152 CLR 657 at 660 per Gibbs CJ and Brennan J and 691 per Dawson J.

<sup>83</sup> (1983) 152 CLR 657 at 661 per Murphy J and 669 per Deane J.

<sup>84</sup> To use the still influential test from England, see *R v Cooper* [1969] 1 QB 267 at 271.

<sup>85</sup> To use the test in Australia as expressed by Dawson J in *R v Whitehorn* (1983) 152 CLR 657 at 689.

<sup>86</sup> Again, as in *Ziems*, these observations are strictly *obiter*, but, obviously, any informed observation from judges as eminent as Deane and Dawson JJ are not to be lightly disregarded.

[8.4.3] Both judges firmly stated their acceptance of the concept of the proper role of the prosecutor as that of a minister of justice. Furthermore that role extended to any decision made by the prosecutor as to what witnesses to call at trial. Nevertheless, Deane J noted that under the adversarial criminal process that existed in Australia it was for the prosecution, and not for the judge, to determine what witnesses would be called by the prosecution at trial. But this proposition was subject to a crucial qualification:

That is not to say that the Crown is entitled to adopt the approach that it will only call those witnesses whose evidence will assist in obtaining a conviction. Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function, of presenting the case against an accused, he will act with fairness and detachment and always with the objective of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.<sup>87</sup>

[8.4.4] Dawson J offered a similar opinion. Noting the various observations in the main cases<sup>88</sup> dealing with the discretion of the prosecutor in calling witnesses, he remarked:

No doubt all of those observations are merely aspects of the general obligation which is imposed upon a Crown Prosecutor to act fairly in the discharge of the function which he performs in a criminal trial. That function is ultimately to assist in the attainment of justice between the Crown and the accused.<sup>89</sup>

[8.4.5] Accordingly while both Deane J and Dawson J accepted that in an adversarial criminal system the decision as to what witnesses to call was solely an issue for the prosecution, that decision was, in practice, inhibited by the strict requirements to ensure fairness to an accused person. To ensure such fairness the prosecutor should ordinarily call any material witness, whether such a witness was named on the back of the indictment or not. Deane J described this obligation in the following terms:

The observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations. Whether or not their names appear on the back of the indictment or information, all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown unless valid reason exists for refraining from calling a particular witness or witnesses...<sup>90</sup>

[8.4.6] Deane J did offer a significant qualification to the proposition that the prosecution must call any such material witnesses. His Honour observed that, where the circumstances justified it, the witness need not be called to give evidence but rather could

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<sup>87</sup> (1983) 152 CLR 657 at 663-664.

<sup>88</sup> These are the authorities from *R v Harris* [1927] 2 KB 587 at 590 to *R v Lucas* [1973] VR 693 at 705-708 that have been discussed at length previously.

<sup>89</sup> (1983) 152 CLR 657 at 675.

<sup>90</sup> (1983) 152 CLR 657 at 664.

be tendered by the Crown for the purpose of cross-examination<sup>91</sup> or, at the very least, “made available to be called by the defence [my emphasis].”<sup>92</sup>

[8.4.7] Dawson J, again, expressed a similar opinion. His Honour considered that it “forms part of a description of the functions of a Crown Prosecutor” to call all available material witnesses.<sup>93</sup> The fact that a witness did not advance the prosecution case did not prevent him or her from being called:

All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye-witnesses of any events which go to prove the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case.<sup>94</sup>

[8.4.8] It was only in strictly limited situations in the view of Dawson J, such as where the evidence of the potential witness was irrelevant or was unduly repetitive<sup>95</sup> or was likely to be “plainly untruthful or unreliable,”<sup>96</sup> that the prosecutor would be justified in not calling that particular witness.

[8.4.9] The extent of the expectations cast upon the prosecution by the observations of Dawson and Deane JJ as to whom the prosecutor should call as witnesses are extensive. These expectations can conflict with the role of the prosecutor as an active advocate in an adversarial criminal system. There are clear risks I would assert in an adversarial criminal process in unnecessarily confining the discretion of the prosecutor in how he or she should present the prosecution case.<sup>97</sup> Both Deane and Dawson JJ disregarded, perhaps unwisely, the need for caution advised by the High Court in *Richardson* to avoid elevating comments made for the benefit of guidance for prosecutors into a rigid rule of inflexible application. I would suggest that subsequent Australian decisions illustrate that the concern expressed on this point in *Richardson* has not proved to be misplaced and that Deane and Dawson JJ may have been better served by heeding this advice and to have refrained from offering general guidance to prosecutors in such prescriptive terms. *Whitehorn*, or rather the comments of Deane and Dawson JJ, are a significant departure from the “adversarial” role of the prosecution in calling witnesses recognised by the High Court in *Richardson*.

[8.4.10] Whether the facts of *Whitehorn* supported such a duty, though it was not called such, on the prosecution is debatable. It is arguable that the prosecution’s decision not to call the seven year old victim was both proper and understandable given the victim’s age and apparent level of comprehension. Though Murphy J asserted that the prosecution had

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<sup>91</sup> As was done in *R v Vincent* (1839) 9 Car & P 91 at 106. See further Chapter 7, n 98.

<sup>92</sup> (1983) 152 CLR 564. The wider significance of this comment will be discussed in Part 1 of Chapter 11.

<sup>93</sup> (1983) 152 CLR 657 at 674.

<sup>94</sup> (1983) 152 CLR 657 at 674.

<sup>95</sup> (1983) 152 CLR 657 at 664 per Deane J.

<sup>96</sup> (1983) 152 CLR 657 at 664 per Deane J. See also the similar view of Dawson J (1983) 152 CLR 657 at 674. See further the discussion of this issue in Part 6 of this Chapter.

<sup>97</sup> See further the discussion in Part 8 of this Chapter in relation to *R v Dyers* (2002) 210 CLR 285.

failed to provide any satisfactory explanation for failing to call the victim at trial, it is notable that Deane J specifically commented that there had been no suggestion that the prosecution had been influenced by tactical or other improper considerations in its failure to call the victim. It is arguable that the decision not to call the little girl was in accordance with the now obligatory requirement of the prosecution to pay regard to the welfare and interests of a victim in the discharge of its functions.<sup>98</sup> The trauma and stress that is all too often attendant upon giving evidence at trial, especially for a young victim of a sexual assault, is so well known as to be almost a matter of judicial notice.<sup>99</sup> It might well be thought appropriate for a prosecutor to spare a young victim such as in *Whitehorn* such trauma and distress, especially where the accused is a close relative, if alternative evidence existed. The fact that such a decision could have the practical effect of weakening the prosecution case to the point, as it did in *Whitehorn*, where a reasonable jury could not convict on the evidence put at trial is a tactical risk that the prosecution must decide to take if it chooses to omit an important witness from its case. There are likely to be cases where it is appropriate for the prosecution to refrain from adducing a particular witness for reasons beyond those contemplated by Deane J and Dawson J in *Whitehorn* (repetition or unreliability or dishonesty).<sup>100</sup> In the English decision of *R v Haringey Justices, Ex parte DPP*<sup>101</sup> Stuart-Smith LJ pointed to the extreme youth of a victim and the likely adverse consequences in giving evidence (potentially as existed in *Whitehorn*) or the fact that the witness is frightened and refuses to give evidence as circumstances in which the prosecution might well be justified in electing not to call even an important witness such as the victim of the alleged offence.<sup>102</sup> Such recognition is sensible. Not only might there be little purpose in compelling a plainly unwilling witness to give evidence but there are likely to be further considerations relating to the welfare of the unwilling victim or witness. In considering the prosecutorial role in calling witnesses it is important that such valid considerations are not ignored or too lightly discounted and attention solely directed at promoting fairness to the accused.

[8.4.11] The High Court appears to have felt that the comments in *Whitehorn* of Dawson and Deane JJ had not resolved or clarified the prosecutor's precise obligations in the calling of witnesses because, shortly after *Whitehorn*, the High Court in 1984 in *R v Apostilides*<sup>103</sup> took the opportunity to state in, what has proved to be a pivotal statement of the law in Australia, a unanimous joint judgment certain "general propositions... applicable to the conduct of criminal trials in Australia":<sup>104</sup>

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<sup>98</sup> It is now established by law and/or policy in most jurisdictions that the welfare and interests of victims are important factors to prosecuting lawyers in the performance of their duties.

<sup>99</sup> See, for example, Bala, N, "The Supreme Court Sends a Clear Message (Again): Children are not Adults" (1999) 27 CR (5<sup>th</sup>) 195 and Hunter *et al*, Ch 4, n 19, 1167, 1176-1179, 1184-1186 and especially 1231-1240.

<sup>100</sup> See further the discussion in Part 3 of Chapter 10 at [2.3.7]-[2.3.9].

<sup>101</sup> [1996] 1 All ER 828. See further the discussion of this decision in Part 9 of Chapter 9.

<sup>102</sup> [1996] 1 All ER 828 at 832. As early as 1969 it was suggested that due to the victim's age or other factors "there might be sufficient hardship to justify the victim not giving evidence" (Newark, N, and Samuels, A, "Let the Judge call the Witness" [1969] Crim LR 399 at 400). Victims of domestic violence and sexual assault may well also fall into this category.

<sup>103</sup> (1984) 154 CLR 563.

<sup>104</sup> The High Court did indicate that these propositions were not meant to be exhaustive.

1. The prosecutor alone has the responsibility of deciding whether a person will be called as a prosecution witness.
2. The trial judge could question the prosecutor as to the reasons why a person was not called but there was no obligation to do so. The judge was not called to rule upon the sufficiency of those reasons.
3. The judge could properly invite the prosecutor to reconsider a decision not to call a particular witness and the implications thereof but the judge had no power to direct or compel the prosecutor to call the witness.<sup>105</sup>
4. It may be proper to draw an adverse inference from the failure of the prosecutor to call a witness in accordance with the rule in *Jones v Dunkel*<sup>106</sup> and any such inference would be affected by any reasons for not calling a witness as the prosecutor considered proper to release.<sup>107</sup>
5. A trial judge could only call a witness in the “most exceptional circumstances.”<sup>108</sup>
6. A decision of the prosecutor not to call a particular witness will only amount to a ground for setting aside a conviction when, viewed against the conduct of the trial as a whole, the absence of that witness gives rise to a miscarriage of justice. The fact that the prosecutor’s decision may be wrong will not necessarily lead to the quashing of any conviction (conversely it is unnecessary to establish any misconduct or even any “error of judgment” on the part of the prosecution if the absence of the witness still amounts to a miscarriage of justice).

[8.4.12] These propositions are neither radical nor startling. Indeed, they emphasise both the adversarial nature of the criminal process and the fact that in such a process it is for the prosecutor ultimately to decide as to how he or she will present his or her case. After all the High Court specifically emphasised, as quoted earlier, that the role of the prosecutor in an adversarial system in deciding what witnesses to call at trial “is not only a lonely responsibility but also a heavy one.”<sup>109</sup>

[8.4.13] However, the High Court was careful not to omit reference to the minister of justice dimension of the functions of the prosecutor and clearly stated that this dimension

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<sup>105</sup> The High Court approved comments to this effect in *R v Evans* [1964] VR 717 at 719 and *R v Eastwood & Boland* [1973] VR 709 at 714. See also *R v Skubevski* [1977] WAR 129. The position in England, after some confusion, now seems identical, see *R v Baldwin*, *The Times*, 3 May 1978 and *R v Grafton* [1992] 4 All ER 609. See further Chapter 9, n 29.

<sup>106</sup> (1959) 101 CLR 298.

<sup>107</sup> This must now be read subject to the High Court’s problematical decision in *R v Dyers* (2002) 210 CLR 285.

<sup>108</sup> (1984) 154 CLR 563 at 575. See also *R v Cleghorn* [1967] 1 All ER 996, *R v Grafton* [1992] 4 All ER 609 and *R v Griffiths* (1996) 91 A Crim R 203. cf *R v Cushway* (1968) 62 QJPR 90. See further *R v Tregear* [1967] 1 All ER 989; *R v Damic* (1982) 6 A Crim R 35; *R v Wilson* [1998] 2 Qd R 599; and *R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828 for examples of exceptional cases where the court was entitled to call a witness.

<sup>109</sup> (1984) 154 CLR 563 at 575 and 576.

extended to the prosecutor's decision in calling witnesses. The court heavily qualified the six propositions noted above and, in a crucial caveat that has heavily influenced the subsequent development of the law, observed:

A decision whether or not to call a person whose name appears on the indictment... must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare.<sup>110</sup>

[8.4.14] By way of illustration the court emphasised that a decision by the prosecutor to not call a witness on the basis of unreliability would only be justified by clear grounds and not a mere suspicion.<sup>111</sup>

[8.4.15] These further observations in *Apostilides* had the unfortunate effect of muddying the judicial water. It will be seen that the ongoing tension between the prosecutorial roles of minister of justice and adversarial advocate in the calling of witnesses was not only exposed by the judgment of the High Court in *Apostilides*, but was left frustratingly unresolved. It is my contention that subsequent Australian decisions, far from reconciling this tension in prosecutorial roles, have significantly increased it and have placed considerable and impracticable restraints on the professional role of the prosecutor in deciding what witnesses to call at trial. What should be a relatively straightforward task in an adversarial criminal system has thus become a daunting and fraught exercise in Australia.

[8.4.16] Indeed, the very facts of *Apostilides* highlight the acute, and one might assert impracticable, restraints that can be placed upon the prosecution in its choice of witnesses at trial. The accused in that case had been convicted of rape. The victim and two women called Tibballs and Jeffery had been at a public house and had encountered the accused and a friend of his called Brodie. The parties had returned to the victim's flat. Tibballs and Brodie had become romantically inclined and had left together. The victim stated that she had rebuffed the advances of the accused and that he had then raped her with considerable violence. The accused accepted that sexual intercourse had taken place but asserted that this had taken place with the victim's consent.<sup>112</sup> The statements of Brodie and Tibballs were served on the accused post-committal and both were deemed to be "named on the back of the indictment."<sup>113</sup> Both witnesses had described mutual "flirtation" prior to the alleged rape between the accused and the victim.<sup>114</sup>

[8.4.17] Jeffery was called as a prosecution witness at trial. But prosecuting counsel refused to call either Brodie or Tibballs as prosecution witnesses despite the objections of

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<sup>110</sup> (1984) 154 CLR 563 at 576.

<sup>111</sup> (1984) 154 CLR 563 at 576.

<sup>112</sup> The evidence of the alleged rape essentially boiled down to the word of the victim against that of the accused. The victim had some injuries but these were equally consistent with either her account or that of the accused. Though Brodie and Tibballs could provide material evidence as to the events leading up to the rape, both had left before the alleged rape had taken place. Their evidence also seems to have been equivocal.

<sup>113</sup> This was also made clear in *R v Mason & Ors* [1996] Crim LR 325, see further Part 10 of Chapter 9,

<sup>114</sup> The defence evidently wished to rely upon this as supporting their assertion that any subsequent sexual intercourse had taken place with the victim's consent.

defence counsel and the evident unease of the trial judge. Though prosecution counsel was reluctant to divulge his reasoning,<sup>115</sup> he eventually explained that he regarded both Brodie and Tibballs as unreliable witnesses. Brodie was a friend of the accused who had even proclaimed outside court his identification with the accused and his cause. Brodie had an elderly conviction for dishonesty and had other dishonesty charges pending. Tibballs had maintained her romantic association with Brodie and had apparently declared her antipathy to the prosecution case.<sup>116</sup> In the words of prosecution counsel, “she had put herself in the defence camp.”<sup>117</sup> The defence were obliged to call both Brodie and Tibballs. Both were cross-examined by the prosecutor during which Brodie’s conviction emerged and Tibballs, despite the prosecutor’s initial suspicions, apparently did not prove a hostile witness to the prosecution case. The prosecutor even commended her evidence to the jury in his closing address as credible.

[8.4.18] The defence complained on appeal about the course that the trial had taken. The Court of Appeal of Victoria accepted that these complaints were well founded. The trial judge had erred in his response to the prosecutor’s refusal to call either Brodie or Tibballs.<sup>118</sup> However, Kaye J went further and considered that both witnesses should have been called by the prosecution at trial, especially as Jeffery had been called. His Honour rejected as unsustainable the explanation proffered by the prosecutor in not calling the two witnesses. Both Brodie and Tibballs were material witnesses and despite the prosecution’s assertion neither could be properly discarded as unreliable.<sup>119</sup> Though Kaye J’s reasoning on this point was later approved in Victoria,<sup>120</sup> I would question his conclusion. It is arguable that, notwithstanding Kaye J’s view, the prosecution had a sound basis to be entitled to decline to call Brodie and Tibballs. Neither the defence nor the jury were “kept in the dark” as regards their evidence and the accounts of both witnesses were put before the jury, though on behalf of the defence. It is significant that the High Court refrained from endorsing the conclusion of the Court of Appeal. In refusing the prosecution special leave to appeal, on essentially policy grounds,<sup>121</sup> the High Court pointedly remarked of the Court of Appeal’s conclusion regarding Tibballs and Brodie, “this is a matter on which opinions might readily differ.”<sup>122</sup>

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<sup>115</sup> On the understandable basis that such a decision should not be “a matter for public discussion in front of the defence on every occasion that a decision is made” (1983) 11 A Crim R 381 at 384 per Young CJ.

<sup>116</sup> Though this information had come from hearsay or “third hand” sources.

<sup>117</sup> (1983) 11 A Crim R 381 at 392.

<sup>118</sup> The Court of Appeal held that, applying *Lucas*, the judge should have considered “inviting” the prosecutor to call the two witnesses or to have raised a *Jones v Dunkel* adverse inference or even to have called the two witnesses himself.

<sup>119</sup> (1983) 11 A Crim R 381 at 396.

<sup>120</sup> See *R v Foley* (1984) 13 A Crim R 29 at 33 per Starke J.

<sup>121</sup> As the Court of Appeal’s findings largely involved an exercise of discretion it was held wrong to intervene.

<sup>122</sup> (1984) 154 CLR 563 at 578.



## Part 5: A Fertile Source of Challenge: Defence Complaints as to the Prosecution's Choice of Witnesses

[8.5.1] Even a cursory scrutiny will reveal that, in Australia in the period after *Apostilides*, the purported failure or refusal of the prosecution to call a particular witness has proved to be a fertile area of defence complaint at both trial and on appeal. Even when compared with England,<sup>123</sup> there have been numerous cases that have invoked the “duty” of the prosecution to call a particular witness at trial. The issue has been raised in often imaginative contexts. It has been variously asserted that the absence of a witness gives rise to a miscarriage of justice such as to lead to the quashing of a conviction<sup>124</sup> or even that calling a witness has given rise to a miscarriage of justice<sup>125</sup> or that the absence of the witness renders the continuation of the proceedings an “abuse of process” that should be stayed<sup>126</sup> or that an adverse *Jones v Dunkel* inference should be permitted against the prosecution for not calling a witness<sup>127</sup> or that the trial judge should have given an “indication” or “invitation” that a reluctant prosecutor should call the witness<sup>128</sup> or, failing that, called the witness him or herself.<sup>129</sup> It is true that in the great majority of cases these complaints have been rejected for a variety of reasons by the courts.<sup>130</sup> It may be that it is apparent that the evidence of the witness is immaterial to the issues at trial<sup>131</sup> or that the witness is likely to prove plainly unreliable or incredible<sup>132</sup> or that the efforts of the defence in raising the issue are, at best, optimistic or, at worst, misconceived, if not mischievous.<sup>133</sup>

[8.5.2] However, it is important not to be led into believing that, because the bulk of the defence complaints were rejected, this issue does not occasion considerable philosophical

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<sup>123</sup> See the comment in *R v Brown & Brown* [1997] 1 Cr App R 112 at 113 about the increasing number of appeals against conviction in England based on the prosecution's failure to call a particular witness, see further Chapter 9, n 1.

<sup>124</sup> See *R v Shaw* (1991) 57 A Crim R 425, *R v O'Brien* (1996) 66 SASR 396 and *R v Rigney* (2005) 241 LSJS 172.

<sup>125</sup> See *R v Goncalves* (1997) 99 A Crim R 193.

<sup>126</sup> See *R v Dowding* (2000) 159 FLR 204, *Eate v Police* (2004) 236 LSJS 376, *R v Gillis* (1994) 12 WAR 493 and *R v Rich (Ruling No 9)* [2008] VSC 453.

<sup>127</sup> See *Martin v Visser* [2000] TASSC 173, *R v Martin* [2000] VSCA 163 and *R v Harms* [2002] QCA 121.

<sup>128</sup> See *DPP v Ivanovic (Ruling No 3)* [2003] VSC 389.

<sup>129</sup> See *R v Barrett* [2005] VSC 31 and *R v Smart (No 4)* [2008] VSC 89.

<sup>130</sup> In *R v Dowding* (2000) 159 FLR 204 at [55] Teague J commented that in his wide experience of dealing with such complaints that ultimately the evidence of the witness in question had proved to be of little consequence.

<sup>131</sup> See *R v Albu* (1995) 84 A Crim R 11, *R v Allen and Ors* (1993) 66 A Crim R 376, *R v Harms* [2002] QCA 121 and *R v Lovett* [2006] VSC 166.

<sup>132</sup> See *R v Su* [1997] 1 VR 1, *R v Palmer* [2000] VSCA 236, *R v J (No 2)* [1998] 3 VR 602, *R v O'Brien* (1996) 66 SASR 396, *R v Rich (Ruling No 9)* [2008] VSC 453 and *R v Tuligi* [2009] SASC 306.

<sup>133</sup> See *R v Jamieson* (1992) 60 A Crim R 68 where the defence insisted on the prosecution in a particularly brutal murder case calling a man called “Shorty” whom the accused suggested had been the murderer. Defence counsel conceded that he had thought “Shorty” would exercise his right not to incriminate himself and this would allow him to raise the suspicion that “Shorty” had something to hide and may have been the murderer. The accused did not give evidence. See also *DPP v Jensen* [2007] VSC 77. Such defence tactics were roundly criticised in England in *R v Bradish & Hall* [2004] EWCA Crim 1340 at [38]. See further Chapter 9, n 255.

and practical difficulties to prosecutors. I would assert that a consideration of the various cases in Australia since *Whitehorn* and *Apostilides* demonstrate that the requirements imposed upon the prosecution by the courts in its selection of the witnesses to be called at trial is such as to circumscribe the prosecutor’s discretion in an ostensibly adversarial criminal process and to impose strict, and I would suggest, potentially impractical and unrealistic fetters upon this important prosecutorial function. It is particularly apparent that, despite the stricture by the High Court in *Apostilides* against the courts adjudicating upon the sufficiency of the prosecutor’s reasons in not calling a particular witness, that any decision by a prosecutor not to call a potential witness is likely to be subject to the most pressing and forensic scrutiny by the courts.

[8.5.3] On some occasions the courts will encounter little difficulty in accepting the prosecutor’s contention that the evidence of a particular witness is immaterial to the issues in the case. Indeed, it may be so obvious that the evidence of the witness is irrelevant that one must wonder why the defence troubled to raise the issue. For instance, in *R v North*<sup>134</sup> the accused was a “bikie” who had been convicted of a serious assault in a public house. The issue was one of identification. The victim had identified the accused as the assailant by viewing the accused posing with another motorcycle enthusiast and a scantily dressed female in a magazine titled “Live to Ride.” The victim had been supplied with this magazine by a man called Wilson. There was no issue as to the circumstances in which the victim had acquired the magazine and there was no suggestion that Wilson had coached or influenced the identification in any way. Wilson was not called at the trial. Wilson had never made a statement and his role in the case was restricted simply to having provided the victim with the magazine. He had not been named on the indictment. Nonetheless, the defence asserted that the prosecution had failed in its “ever present duty to present fairly to the jury all of the relevant evidence attaching to the charge against the accused.”<sup>135</sup> The New South Wales Court of Appeal gave this argument short shrift. Even on an application of the minister of justice approach the prosecution had no duty to call Wilson. He was not a material witness and it was a matter of pure speculation as to what he may have said.

[8.5.4] Indeed, it is difficult to see how it can be asserted, as it was in *North*, that the prosecution had failed in any duty to call a material witness when that witness hasn’t even provided any statement or proof of evidence. In such circumstances, when no one even knows the contemplated or likely evidence that witness can provide, how can it be asserted that such a witness is “material” and should be called by the prosecution at trial?<sup>136</sup> Such a situation arose in 2000 in *R v Martin*.<sup>137</sup> The accused had been convicted of indecently assaulting his niece some 12 to 13 years earlier. The defence contended that the victim’s aunt, the wife of the accused at the time of the assaults, should have been also

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<sup>134</sup> Unreported, New South Wales Court of Appeal, 4 December 1998, No 60264/98. See also *R v Japaljarra* (2002) 134 A Crim R 261 for a similar case where the defendant’s assertion that a host of material witnesses had not been called by the prosecution was dismissed as hopelessly misconceived.

<sup>135</sup> *R v Buckland* [1977] 2 NSWLR 452 at 457 per Street CJ. Such a precise formulation of the prosecution’s duty was doubted by Hunt CJ at CL in *R v Sandford* (1994) 72 A Crim R 160 at 175.

<sup>136</sup> In addition the defence would be able to claim, with some justification, that it would be wrong for them to be “ambushed” or “surprised” at trial with a witness whose likely evidence is such an unknown quantity.

<sup>137</sup> [2000] VSCA 163.

called by the prosecution. This contention was rejected by the Court of Appeal of Victoria. The problem with the defence proposition was that no one knew what the aunt's evidence would be. The court noted that she had refused to make a statement to the police and neither side had any proof of her contemplated evidence.<sup>138</sup> The aunt had not spoken to the accused for nine years and had no wish to do so. The aunt was not named on the indictment. She had not directly seen the alleged offences though she may have been able to throw light on the surrounding events. The court considered that:

It is doubtful, even in the abstract, whether she could be described as a witness whose evidence was necessary to unfold the narrative and to give a complete account of the events upon which the prosecution was based. How could that be said when neither side had a proof of her evidence concerning, in a sense peripheral, events that had occurred some 12 or 13 years previously? It is easy to understand her not being called by the Crown.<sup>139</sup>

[8.5.5] In other cases the prosecutor's assertion that a witness is immaterial to the issues at trial may well occasion greater difficulty than it had in either *North* or *Martin*. For instance, in *R v Smith*,<sup>140</sup> the accused had been convicted of an "underworld" murder. The defence claimed that a well known Sydney solicitor called White was not only a material witness to the case but that his evidence "went to the heart of the defence case."<sup>141</sup> The defence wished to introduce White to attack the credibility of a crucial prosecution witness. The fact that White had never been named on the back of the indictment and had never furnished any account to the police did not deter the defence from maintaining that White should have been called at trial by the prosecution, if only to allow cross-examination by the defence in the "interests of justice."<sup>142</sup> The New South Wales Court of Appeal, after a lengthy consideration of the issues of the case, rejected this assertion. The court applied the proposition from the English decision of *R v Russell-Jones*<sup>143</sup> that it was not proper to compel or expect the prosecution to call or tender a witness merely to afford the defence with a platform to attack the credit of another prosecution witness.<sup>144</sup> In the present case White was not a material witness. His evidence was neither necessary to give a complete account of the events on which the prosecution case was based nor essential to unfold the narrative.<sup>145</sup> Similarly, in *R v Gibson*<sup>146</sup> the defence claimed that the

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<sup>138</sup> See the similar situation in *R v J (No 2)* [1998] 3 VR 602 where the defence contended that the complainant's mother, the wife of the accused, should have been called by the prosecution. The mother had refused to provide a statement and no-one had a proof of her likely evidence. It is noteworthy that the trial judge had categorised it as "irresponsible" for the prosecution to call such an unproved witness and it is further significant that defence trial counsel agreed with this view [1998] 3 VR 602 at 622. Why the defence, nonetheless, chose to raise this issue on appeal in *J* is questionable.

<sup>139</sup> [2000] VSCA 163 at [16].

<sup>140</sup> [2000] NSWCCA 202.

<sup>141</sup> [2002] NSWCCA 202 at [60].

<sup>142</sup> This does raise the obvious point that if White was such an important defence witness why the defence had not secured his attendance, even if a subpoena was required.

<sup>143</sup> [1995] 3 All ER 239.

<sup>144</sup> [1995] 3 All ER 239 at 244. See further the discussion in Part 8 of Chapter 9.

<sup>145</sup> [2002] NSWCCA 202 at [76].

<sup>146</sup> [2002] NSWCCA 401.

brother of the accused should have been called by the prosecution at trial. Indeed, various imputations were directed at prosecution counsel for her refusal to call the brother. The prosecutor’s decision was upheld by the New South Wales Court of Appeal, though only after the most extensive analysis. The court concluded that on the particular issues in dispute at trial the brother’s evidence was of “no practical utility.”<sup>147</sup>

[8.5.6] On some occasions the courts will be untroubled in accepting the prosecution’s contention that a particular witness is likely to prove unreliable or incredible at trial. Indeed, it may seem so obvious that the witness is patently unreliable that it almost beggars belief that the defence should, nevertheless, question the prosecutor’s failure to call that witness. An illustration of such a situation is *R v Dudko*.<sup>148</sup> The accused had been convicted of the “rescue” by “force” of her then lover, a notorious criminal called Killick, from prison through hijacking a helicopter and landing it in the prison yard and making off with him. The defence asserted that the prosecution’s failure to call Killick as a witness had amounted to a “substantial miscarriage of justice.”<sup>149</sup> Spigelman CJ, delivering the judgment of the New South Wales Court of Appeal, had no hesitation in rejecting this optimistic contention. Not only had Killick pleaded guilty to his role in the escape but he had a lengthy criminal history and was serving a term of imprisonment at the time of his escape. The Chief Justice commented:

Obviously Killick could have given evidence about every pertinent matter in the trial. There will be circumstances in which the failure to call a witness will be found to give rise to a miscarriage of justice...This is not such a case. It would not be often that the Crown must call a co-offender, even one who has pleaded guilty and been sentenced for the offences. Killick was so obviously a biased and unreliable witness with respect to the involvement of the appellant that there was no obligation on the Crown to call him.<sup>150</sup>

[8.5.7] A similar situation was presented by the case of *R v Mylonas and Others*<sup>151</sup> in 1985. The three defendants had been convicted on “extremely strong”<sup>152</sup> evidence in relation to large scale cultivation of cannabis at two properties. It was significant that \$8000 had been spent at one of the properties installing elaborate and suspicious fencing.<sup>153</sup> A man called Chris Hall had purportedly ordered and paid for the fences but there was compelling evidence in the prosecution case to suggest that this was really one of the defendants.<sup>154</sup> A woman called Matkovich was the owner of the two properties and the aunt of another of the defendants. She had given evidence for the Crown at committal and was presumably named on the indictment. The prosecutor refused to call her at trial. She was called by the defence. Her explanation in respect of the fencing was that Hall actually

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<sup>147</sup> [2002] NSWCCA 401 at [59].

<sup>148</sup> (2002) 132 A Crim R 371.

<sup>149</sup> (2002) 132 A Crim R 371 at 388.

<sup>150</sup> (2002) 132 A Crim R 371 at 388-389.

<sup>151</sup> (1985) 20 A Crim R 214.

<sup>152</sup> (1985) 20 A Crim R 214 at 228.

<sup>153</sup> I must confess my ignorance as to the precise significance of the fencing in the cultivation of cannabis. One of the fences enclosed a small yard with asbestos six feet above the ground and within this yard reticulation piping had been laid out and brass butterfly sprinklers installed.

<sup>154</sup> All four fencing contractors identified this defendant as the “Chris Hall” who had ordered the fences.

existed, but had, most conveniently, disappeared at the time of the trial. He had leased that property for a short time. Wallace J dryly commented that, "Why he should thereupon embark upon an exercise costing approximately \$8000 in fencing that property in such a strange manner was never explained other than to retain some kangaroos! [His Honour's emphasis]"<sup>155</sup> The prosecutor in cross-examination invited the jury to treat Matkovich's evidence with some caution. In such circumstances the court was untroubled, noting both Matkovich's dubious account and her ownership of the two properties and her link to one of the defendants, in rejecting the defence complaint as to the Crown not calling her.

[8.5.8] Another relatively simple illustration of a case where the prosecutor was entitled to refuse to call a potential witness on account of his patent unreliability is provided by *Tran v Magistrates' Court of Victoria*.<sup>156</sup> Tran had been charged with assaulting a police officer in the course of a fracas at a solicitor's office. Tran asserted the police had assaulted him. There had been a considerable number of witnesses to the incident. A youth called Zogheib was a witness and had been warned to give evidence as a prosecution witness at the summary trial.<sup>157</sup> However, on the first day of the trial Zogheib not only refused to indicate what evidence he would give but had also declared his intention to the prosecutor "to fix the cops up" and said that he was "going to fix you guys."<sup>158</sup> Zogheib further declared that, "I don't care what I say as long as Tran will get off."<sup>159</sup> In the face of such an overt demonstration of hostility it is hardly surprising that the prosecutor refused to call Zogheib at trial.

[8.5.9] On appeal the defence asserted that this omission, notwithstanding the fact that the prosecutor had made Zogheib available as a defence witness, amounted to a "miscarriage of justice."<sup>160</sup> This contention was rejected by the Court of Appeal of Victoria. Buchanan JA, delivering the principal judgment, noted that this case was distinguishable from the situation that had arisen in both *Apostilides* and *R v Shaw*<sup>161</sup> where there had merely been a suspicion of unreliability or prior inconsistency on the part of the uncalled witness, whereas in this case, "The prosecutor did not merely suspect that the witness was unreliable: he knew it."<sup>162</sup>

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<sup>155</sup> (1985) 20 A Crim R 214 at 227. At least any kangaroos would not have been in want for water.

<sup>156</sup> [1998] 4 VR 294.

<sup>157</sup> Though it is not made explicit in the judgment this seems to have being treated as tantamount to Zogheib being "named on the back of the indictment." See further *R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828 and Chapter 9, n 192.

<sup>158</sup> [1998] 4 VR 294 at 296.

<sup>159</sup> [1998] 4 VR 294 at 296.

<sup>160</sup> [1998] 4 VR 294 at 295. As in *R v Smith* [2000] NSWCCA 202 one must question the insistence of the defence in seeking to compel the prosecutor to call a witness such as Zoeghib. Such an effort seems misguided, if not mischievous.

<sup>161</sup> (1991) 57 A Crim R 425. See below in Part 6 the discussion of *Shaw*.

<sup>162</sup> [1998] 4 VR 294 at 297. Buchanan JA also noted that there had been a large number of other witnesses to the fracas who had been called at trial. Zogheib's evidence was presumably not crucial in any event.

## Part 6: Taking the Minister of Justice Approach Too Far?

[8.6.1] However, many cases have not proved as simple or straightforward to resolve as *Dudko*, *Mylonas* and *Tran*. It is seldom that one will encounter witnesses as obviously partisan and unreliable as Killick, Matkovich and Zogheib.<sup>163</sup> In other circumstances the task of confidently determining whether the witness is likely to prove unreliable or incredible, and whether such a judgment on the part of the prosecutor will be upheld on appeal, will prove infinitely more difficult and problematic. A vivid illustration of such a situation is presented by the cases of *R v Kizon and Kizon*<sup>164</sup> in 1985, *R v Shaw*<sup>165</sup> in 1991 and *R v Kneebone*<sup>166</sup> in 1999. These cases highlight the difficulties that can arise in practice for prosecutors in deciding who, and who not, to call at trial. *Shaw* and *Kneebone* are additionally significant in illustrating the marked, and potentially impracticable, restraints that can be placed on the “discretion” of the prosecutor in Australia as to which witness to call at trial.<sup>167</sup>

[8.6.2] In *Kizon* the two defendants had been charged with assault arising from a fracas during which two brothers had been injured. The two victims described a savage and unprovoked assault. The defendants asserted that they had been acting in self-defence. Though there had been numerous witnesses at the scene the only ones who came forward to the police were three friends of the defendants who had been with them at the relevant time. Their accounts supported the defendants’ version of events. The friends, one in particular, had criminal convictions. This far from unusual situation presented the prosecution with a difficult decision as to whether or not the three friends should be called as part of the prosecution case. On an application of the familiar minister of justice test the prosecutor might well have felt obliged to call the three friends at trial. Could the prosecutor in *Kizon* feel confident that any judgment that the friends were “plainly unreliable or incredible” would be accepted at either trial or on appeal?<sup>168</sup>

[8.6.3] The friends were called at committal and adhered to their accounts supporting the defendants. They were named on the back of the indictment. However, at trial the prosecutor resolutely refused to call them. The defence protested and asserted that the prosecutor was breaching his traditional duty of fairness to present all relevant evidence of what had occurred, whether it furthered the prosecution case or not. The defence were aware that if they were forced to call the witnesses then they would expose the friends, especially the one with the lengthy criminal history, to the prospect of damaging cross-examination from the Crown and they would also forego the tactical advantage of cross-examination.<sup>169</sup> The explanation of prosecution counsel was that he would present the

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<sup>163</sup> See also *R v Winning* [2003] WASCA 245 and *R v Smart (No 4)* [2008] VSC 89 for similarly obvious cases.

<sup>164</sup> (1985) 18 A Crim R 59.

<sup>165</sup> (1991) 57 A Crim R 425.

<sup>166</sup> (1999) 47 NSWLR 450.

<sup>167</sup> To *Shaw* and *Kneebone* can now be added *R v Jensen* [2009] VSCA 266.

<sup>168</sup> See the similar predicament that confronted the prosecutor in *R v Grafton* [1992] 4 All ER 609. See the discussion in Part 4 of Chapter 9.

<sup>169</sup> This was a fear that particularly troubled Murphy J in *R v Shaw* (1991) 57 A Crim R 425 at 431.

prosecution case at trial on the basis that the two victims were telling the truth.<sup>170</sup> Given that the friends contradicted the accounts of the two victims it had to be the friends who were not telling the truth. The prosecutor stated he “was not prepared to be a party to calling witnesses whose evidence he did not believe.”<sup>171</sup> The trial judge declined to intervene. The defence called the friends who were cross-examined about their bad character and partiality to the accused.<sup>172</sup> The two defendants were convicted.

[8.6.4] On appeal the Supreme Court of Western Australia, despite noting and applying the decision of the High Court in *Apostilides*, was dismissive of the continued defence protestations of “unfairness.” Rowland J accepted the prosecutor’s blunt contention:

Counsel for the respondent [the Crown] reminded us that a criminal trial is not for the squeamish, that the adversary system is alive and well and that it would have been futile for the Crown to call the three witnesses in issue in view of the statements that they had given in chief at the earlier committal hearing. I agree entirely with all of those comments. It is for the Crown to decide which witnesses it will call and its obligations is to have those witnesses available for the defence if the defence so require.<sup>173</sup>

[8.6.5] Wallace J<sup>174</sup> expressed a similar view. The accounts of the friends were, “to say the least, suspect” and were in “complete conflict” with that of the victims.<sup>175</sup> His Honour raised the question of how the prosecution was to conduct its case so as to place before the jury all of the evidence which should be available to it for their deliberation. Wallace J considered that the prosecution could hardly put before the jury as evidence in support of its case, “evidence which it believed to be untrue and given by men of doubtful credit.”<sup>176</sup> Therefore the prosecution had been entitled to refuse to call the friends.

[8.6.6] The court in *Kizon*, while ostensibly loyal to *Apostilides*, did grasp the illogical nature of the prospect of the prosecution being expected to call witnesses such as the friends of the defendants who were so unhelpful to the prosecution case. But both the observations and the conclusion of the court in *Kizon* need to be contrasted with *Shaw* and *Kneebone*.

[8.6.7] In *Shaw* the accused had been convicted of murder following the fatal stabbing of the deceased during an altercation between two rival groups of youths. The accused and a girl called Goyen had been in one of the groups and the deceased had been in the other. Goyen had been present at the time of the murder but had given differing accounts to police of the circumstances of the murder. Prior to trial the prosecution had indicated to the defence that Goyen would not be called as a prosecution witness as she was “an

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<sup>170</sup> It is difficult to see how else any prosecutor could have presented the case.

<sup>171</sup> Though see *R v Brent* [1973] Crim LR 275 where it was accepted that the prosecution might well present witnesses who contradicted their case, see the discussion in Part 4 of Chapter 9. See also *R v Goncalves* (1997) 99 A Crim R 193.

<sup>172</sup> See the similar situation that arose in *R v Oliva* [1965] 3 All ER 116 where, as in *Kizon*, it was also likely that the dubious witnesses that the defence were compelled to call did not impress the jury with their testimony.

<sup>173</sup> (1985) 18 A Crim R 59 at 69.

<sup>174</sup> The remaining member of the court, Olney J, agreed with Wallace J.

<sup>175</sup> (1985) 18 A Crim R 59 at 64.

<sup>176</sup> (1985) 18 A Crim R 59 at 64.

unreliable witness and provide[d] a version of events which on its face [was] inconsistent with the like version provided by other witnesses and the accused himself.”<sup>177</sup> Prosecution counsel adhered to this view at trial, despite the objections of the defence and the unease of the trial judge. The defence was compelled to call Goyen as a defence witness and she was therefore extensively cross-examined by prosecution counsel. Shaw was convicted and appealed.

[8.6.8] The prosecutor’s refusal to call Goyen did not find favour with all three members of the Court of Appeal of Victoria. Young CJ felt that any person present at the time of the fatal stabbing should have been called by the prosecution. Goyen had been correctly described as a “crucial witness” by the trial judge.<sup>178</sup> The Chief Justice concluded that the prosecutor had not been entitled to treat Goyen as “unreliable,” simply on account of the fact that she had provided inconsistent accounts to the police. The Chief Justice further considered, significantly for any prosecutor debating whom to call at trial, “The mere fact that a witness has made inconsistent statements will not generally be a reason for not calling that witness but unreliability may be supported by other considerations as well.”<sup>179</sup>

[8.6.9] Murphy J also considered that the prosecutor had not been entitled to refuse to call Goyen on the basis of her unreliability. His Honour noted the submission of defence counsel at trial that the prosecutor had made no effort to see or speak to Goyen to ascertain her likely reliability or credibility first hand. Murphy J was especially troubled by the fact that in effectively compelling the defence to call Goyen as a witness the defence had lost a “distinct advantage” through being “deprived of the normal opportunity to cross-examine her.”<sup>180</sup> This had both prejudiced the defence and enabled the prosecution to gain the undeserved windfall of cross-examining the witness “because of the improper exercise by the prosecutor of his powers.”<sup>181</sup>

[8.6.10] Nathan J also considered that it was wrong for the prosecutor not to call Goyen. She was not a peripheral witness and could not be simply discounted as “unreliable.” Nathan J was particularly dismissive of the prosecutor’s contention that Goyen “was from the defence camp.”<sup>182</sup> His Honour offered the startling proposition that it “is disadvantageous to the defence to have to call a witness, who may then be seen to be against the Crown and tainted with or by the accused.”<sup>183</sup> Nathan J went on to explain:

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<sup>177</sup> The accused had asserted that he was acting in self-defence.

<sup>178</sup> (1991) 57 A Crim R 425 at 429.

<sup>179</sup> (1991) 57 A Crim R 425 at 429. With respect to the Chief Justice it is difficult to accept this proposition. A central premise of cross-examination in an adversarial trial is to raise and exploit any inconsistencies in a witness’s account as suggestive of unreliability. Logically any such inconsistencies are highly probative in determining whether such a witness is likely to prove unreliable.

<sup>180</sup> (1991) 57 A Crim R 425 at 436. See the further discussion in Part 7 of Chapter 10.

<sup>181</sup> (1991) 57 A Crim R 425 at 436. cf *R v O’Brien* (1996) 66 SASR 396.

<sup>182</sup> (1991) 57 A Crim R 425 at 450. See also the comment by the High Court in *R v MFA* that “it is not the law that a witness is to be treated as ‘unreliable’ simply because he or she is ‘in the camp of’ the accused” (2002) 213 CLR 606 at [81].

<sup>183</sup> (1991) 57 A Crim R 425 at 450. This proposition is novel. It is unobjectionable, if not to be expected, that the defence will call a witness who assists their case and is “against” the prosecution case. Why should the



Her [Goyen's] importance and centrality to the issues was not appreciated by the prosecutor who said to the judge 'she was from the defence camp'. In relation to murder cases, eyewitnesses do not belong to a camp, but are within the class of persons from whom juries expect and are entitled to hear. The characterisation of witnesses being in 'camps' is unfortunate. It necessarily implies that the prosecutor might choose to call only those witnesses favourable to his camp. This is in absolute derogation of a prosecutor's responsibilities.<sup>184</sup>

[8.6.11] It may be that on the particular facts of *Shaw* the prosecution's assessment that Goyen was unreliable was ill-considered and unjustified. But I would question the court's criticism of the prosecution in its choice of witnesses and its insistence that Goyen should have been called. This was not a case where the defence had been left unaware of Goyen's evidence. The court seems to have neglected the vital fact that Goyen's evidence had been presented to the jury, albeit from the defence. It is arguable that the judges in *Shaw*, Nathan J in particular, took the concept of the prosecutor as a minister of justice too far and overlooked the prosecutor's role as an active advocate in an adversarial process. *Shaw* ignores the obvious fact that it is not for the prosecutor to present the defence case and in an adversarial system it surely cannot be appropriate to fetter the prosecutor with the responsibility of calling a witness who is potentially unhelpful to his or her case and who can always be called by the defence. As was observed by Finlayson JA in a Canadian decision, "We must not forget that ours is an adversarial system."<sup>185</sup> Finlayson JA cautioned against too close a scrutiny or review of considered decisions made by the respective lawyers during the course of a criminal trial as to the conduct of their respective cases. "It is no function of this court to play the role of what in football terminology is called a Monday morning quarterback."<sup>186</sup> As His Honour noted, "Such overweening paternalism denigrates the adversary system."<sup>187</sup>

[8.6.12] Though *Shaw* can be criticized, a similarly demanding minister of justice approach was taken in 1999 in *R v Kneebone*. The accused had been convicted at trial of two serious sexual offences involving his partner's daughter. The accused had denied any real wrong doing. In relation to the second offence, at least, the victim's account was supported by certain independent evidence, notably her highly distressed condition and significant injuries.<sup>188</sup> Apart from the victim and the accused, only the mother of the victim had been present at the time of the second offence. The mother was called neither by the defence nor the prosecution at trial. Though prosecution counsel had justified his decision by asserting that the mother was "unreliable" he had reached this view without first speaking to, or "proofing," her in order to determine her credibility and reliability. The mother was hardly an ideal witness for either side. She supported the accused's

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prosecution be expected to call such a witness simply to place the defence in a better tactical position? The Court of Appeal of South Australia has distanced themselves from this proposition and stated that by calling a witness the defence did not give the impression that the witness was "against the Crown" or "tainted with or by the accused," see *R v O'Brien* (1996) 66 SASR 396 at 399 and *R v Rigney* (2005) 241 LSJS 172 at [19].

<sup>184</sup> This is difficult to reconcile with the suggestion in *R v Burdett* (1820) 4 B & Ald 95 at 161-162 that it is unrealistic to expect the prosecution to call a witness identified with the "camp" of the accused. See below n 221.

<sup>185</sup> *R v Lomage* (1991) 2 OR (3d) 621 at 629.

<sup>186</sup> (1991) 2 OR (3d) 621 at 630. I will not attempt to offer an Australian or English equivalent of this phrase.

<sup>187</sup> (1991) 2 OR (3d) 621 at 630.

<sup>188</sup> 469 (1999) 47 NSWLR 450 at 467 per Smart AJ.

version of events but it would have proved a perilous exercise for the defence to have called her.<sup>189</sup> As Smith AJ explained:

Put briefly, the probable serious inroads into the mother’s credit, standing and of her daughter in cross-examination could have done irreparable harm to the appellant’s case. There was the real risk that she would have been seen as supporting him and abandoning her daughter. Yet, she was the only eye witness apart from her daughter and her de facto husband.<sup>190</sup>

[8.6.13] Greg James J and Smart AJ<sup>191</sup> applied the prosecutor’s role as a minister of justice and considered that the absence of the mother at trial had rendered the verdict unsafe. She was a significant witness.<sup>192</sup> Both judges concluded that there had been no material or other basis in the present case to justify the prosecutor’s assertion that the mother was “unreliable.” Both Greg James J and Smart AJ were especially perturbed by the failure of prosecution counsel at trial to have held any interview or discussion with the mother to have determined her reliability or credibility himself.<sup>193</sup> Such a conference is advisable, if not necessary.<sup>194</sup>

[8.6.14] In reaching these conclusions both Greg James J and Smart AJ offered various observations about the prosecutor’s discretion in calling witnesses. Whilst the court’s conclusion in *Kneebone* may be explicable by its particular facts,<sup>195</sup> the court’s

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<sup>189</sup> The mother would have been unlikely to have made a favourable impact on the jury by virtue of her apparent neglect, if not disdain, for her daughter’s welfare both during and after the offences and because of her identification with her partner’s cause.

<sup>190</sup> (1999) 47 NSWLR 450 at 468.

<sup>191</sup> Greg James J and Smart AJ delivered separate judgments. Spigelman CJ simply agreed with both of his colleagues.

<sup>192</sup> There was a difference of opinion between Greg James J and Smart AJ as to how significant the mother’s evidence was. Greg James J regarded her as “essential to the unfolding of the narrative and crucial on credibility” (1999) 47 NSWLR 450 at 462. Smart AJ doubted that the mother’s testimony was “necessary to unfold the narrative and provide a complete account of the events” but accepted that her evidence was, nonetheless, “important” (1999) 47 NSWLR 450 at 471.

<sup>193</sup> Such an exercise would be permitted in Australia but would be practically impossible in England given the present rules of professional conduct there restricting advocates from discussing with witnesses their evidence and the traditional dread of lawyers, especially prosecutors, about speaking to witnesses for fear of being accused of “coaching” or “rehearsing” them.

<sup>194</sup> This point is well illustrated by *R v Armstrong* [1998] 4 VR 533 where the refusal of the prosecutor even to speak to, let alone call, a significant eye witness proffered by the defence was considered to be unreasonable. The court considered that the prosecutor had not discharged his heavy responsibility to ensure a fair trial through his “point blank refusal” to have interviewed the witness or even look at the notes proffered by defence counsel setting out the account of the witness. There had been no basis for the prosecution to assert that the witness was “unreliable.” The view in *Kneebone* and *Armstrong* should be contrasted with the view expressed in England in *R v Smith* [2003] EWCA Crim 1240 where it was held that the prosecution had been entitled to regard a potential material witness in a murder case as unworthy of belief after the witness had asserted before the trial that he could “damage” the prosecution case without even a further interview by the police to discern the basis for his assertion and potential unreliability.

<sup>195</sup> It is arguable that *Kneebone* is an example of prosecutorial “tunnel vision” in its choice of witnesses as reflected by prosecution counsel’s decision not to “proof” the mother and not to call her. Any such “tunnel vision” would be similar to that shown in some of the cases of wrongful conviction discussed in Chapter 5 such as *Judith Ward* or *Mallard* due to prosecution’s non-disclosure of probative material that did not support its case theory of the defendant’s guilt. It is unnecessary to express any conclusion on this point. Whether prosecution counsel in

observations further demonstrate just how tightly circumscribed the “discretion” of the Australian prosecutor is in this particular area and how any decision by the prosecution not to call a witness, especially on the ground of unreliability, will be subjected to the most rigorous judicial analysis.

[8.6.15] Greg James J briefly reviewed the common law decisions dealing with the prosecution's responsibilities in calling witnesses and noted that, with the notable exception of the position in Canada,<sup>196</sup> these decisions broadly accorded with the minister of justice approach required by the decision of the High Court in *Apostilides*. His Honour further noted the guidelines of the New South Wales Director of Public Prosecutions and the *New South Wales Barristers Rules* that both supported the minister of justice approach to the calling of witnesses.<sup>197</sup> With the benefit of this admittedly formidable array of authority, Greg James J felt able to express the following conclusion:

Since both experience and logic confirm that merely because a witness' evidence is inconsistent with or contradicts other evidence, it need not be untrue, it is necessary that a prosecutor whose decision is under examination be able to point to identifiable factors which can justify a decision not to call a material witness on the ground of unreliability:...at least if the suggestion of attempting to obtain an improper tactical advantage is to be avoided. It is therefore necessary for the prosecutor to take appropriate steps, including where necessary interviewing the witnesses to be able to form the opinion.

In reaching a view as to reliability, it is clear that it is not an adequate basis to conclude that the witness is unreliable, merely because the witness' account does not accord with the case theory which is attractive to the prosecutor. An approach, whereby the witness is not called at all or is left to the defence to call because the witness' evidence is seen as not fitting the prosecution's view of the case is likely to lead to a miscarriage of justice...A case theory should accord with the evidence. The prosecutor should not espouse a theory and tailor a case accordingly.<sup>198</sup>

[8.6.16] Greg James J went on to declare that while the prosecutor had the task of determining how the Crown case would be presented and what witnesses would be called, that responsibility also meant ensuring that the prosecution case was presented with fairness to both the accused and the court. This duty is not discharged by seeking to

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*Kneebone* had “tailored” the prosecution case (and the decision not to call the mother) to fit a case theory, as appears to be suggested by Greg James J, that was not supported by the evidence is unclear.

<sup>196</sup> See *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437. The position in Canada will be considered in Chapter 10.

<sup>197</sup> See Guideline 26 of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, p 48 and Rule 66B of the *New South Wales Barristers' Rules*. The prosecution's minister of justice obligation in calling witnesses is also widely supported in Australia by other similar guidelines from both DPPs (see Guideline 8 of the *Guidelines for Prosecutors* (ACT); *Prosecution Policy of the Commonwealth*, p 3, (“servant of justice”); Guideline 1.2(7) of the *Prosecution Guidelines* 2005 (NT); Guideline 37 of the *Director's Guidelines* 2010 (Qld); Guideline 8 of the *Statement of Prosecution Policy and Guidelines* (SA), p 12-13; Guideline 1 of the *Director's Guidelines* (Qld); Guideline 1.5 of the *Prosecution Policy and Guidelines* 2010 (Vic) and the *Statement of Prosecution Policy and Guidelines* 2005 (WA), p 23 at [133]-[134]) and professional bodies (see, for example, Rule A66B of the *New South Wales Solicitors' Rules*, Rule 9.3 of the *South Australia Barristers' Rules* and Rule 66B of the *Australian Bar Association Model Rules* and Rules 139 and 140 of the *Victoria Bar Inc Practice Rules Rules of Conduct and Compulsory Legal Education Rules*). The *Prosecution Guidelines* (Tas) omits any reference to the prosecution role in calling witnesses.

<sup>198</sup> (1999) 47 NSWLR 450 at 460.

avoid placing before the court evidence that could not properly be dismissed as unreliable but which ill accorded with a theory as to the guilt of the accused.<sup>199</sup>

[8.6.17] Smart AJ emphasised that the task that confronted the prosecution in its choice of witnesses at trial was a “formidable and lonely one.”<sup>200</sup> However, the practical significance of this observation was diluted by Smart AJ’s recital<sup>201</sup> of the relevant principles of law. His Honour commented that these principles had been authoritatively stated by the High Court in *Apostilides* and the problem in the present case lay not so much in the statement of those principles but in their application.<sup>202</sup>

[8.6.18] Any assertion according to Smart AJ by the prosecutor that a relevant witness need not be called on the ground of unreliability would have to be based on the most tangible of grounds. The prosecutor’s assessment had “to be based on more than a feeling or intuition.”<sup>203</sup> It is not enough that the prosecutor considered that the witness may prove unreliable. “Suspicion, scepticism and errors on subsidiary matters” would not suffice.<sup>204</sup> The fact that a witness is close to the accused did not mean that the witness should not be called by the prosecutor at trial.<sup>205</sup> It is only where it is apparent that the witness is so devoted to the accused that he or she would not tell the truth that any question would arise as to the prosecution not calling that witness. Smart AJ accepted that novel or unusual situations might arise. However, the “guiding and fundamental principle” remained the over-riding and general obligation of the prosecutor to always act as a minister of justice; “to act fairly in the discharge of the function which he performs.”<sup>206</sup>

[8.6.19] I would suggest that Smart AJ’s statement of the law is open to criticism. With respect to His Honour, he, like Nathan J in *Shaw*, ignored the sound advice offered, originally as long ago as 1820 in *R v Burdett*,<sup>207</sup> that to insist on the prosecution calling a particular witnesses “obviously in the ‘camp’ of the accused” can occasion “grave problems ...in the administration of criminal justice.”<sup>208</sup> As was noted by Hunt CJ at CL in a 1994 case, it is “unrealistic” to expect the prosecution to call a witness who might be

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<sup>199</sup> (1999) 47 NSWLR 450 at 462. See the discussion above at n 195.

<sup>200</sup> (1999) 47 NSWLR 450 at 472.

<sup>201</sup> It is both unnecessary and repetitive to repeat this exercise, see (1999) 47 NSWLR 450 at 470-471.

<sup>202</sup> It is significant that, despite my contention that the law had been correctly stated in cases such as *Woodhead*, *El Dabbah*, *Richardson* and *Van Beelen* and that the courts in Australia from *Whitehorn* onwards had embarked upon a detour neither supported by prior authority nor justified by modern practice, neither the prosecution nor the defence in *Kneebone* disagreed as to the law to be applied. Even the prosecution agreed that the minister of justice approach to the calling of witnesses applied. This is unsurprising given that even the guidelines of the NSW DPP urged such an approach, see above n 197.

<sup>203</sup> (1999) 47 NSWLR 450 at 470.

<sup>204</sup> (1999) 47 NSWLR 450 at 470.

<sup>205</sup> See, for example, *R v Jensen* [2009] VSCA 266. See further the discussion below at n 212.

<sup>206</sup> (1999) 47 NSWLR 450 at 471.

<sup>207</sup> (1820) 4 B & Ald 95 at 161-162.

<sup>208</sup> *R v Williams* [1970] 2 NSWLR 41 at 44.

within the defence “camp.”<sup>209</sup> Though it may have been prudent for prosecution counsel in *Kneebone* to have spoken to the mother to confirm first hand her apparent unreliability, the fact that she was identified with the accused’s “camp” and was apparently neglectful, even hostile, to her own daughter, after even after the daughter had suffered significant injuries, suggests that the prosecutor’s conclusion to decline to call the mother on account of her “unreliability” was, despite the court’s view, in the circumstances, far from unreasonable and unsupportable.

[8.6.20] The comments and the conclusions in both *Shaw* and *Kneebone* demonstrate just how tightly circumscribed the “discretion” of the Australian prosecutor is in this particular area and how stringently the courts will treat any assertion of unreliability by the prosecutor as a justification to not call a potential witness, particularly if such an assertion may not be the real reason for the failure to call the witness. It is noteworthy from cases such as *Shaw* and *Kneebone* that any decision by a prosecutor not to call a witness, especially on account of unreliability, will be the subject of close judicial scrutiny, whether by the trial judge or on appeal. The extent of the judicial scrutiny of any such decision by prosecution counsel is demonstrated by the very recent decision in *R v Jensen*<sup>210</sup> of the Court of Appeal of Victoria. In this case the court disagreed with the considered finding<sup>211</sup> of the trial judge and did not accept the explanation offered by prosecution counsel for declining to call at a murder trial the brother of the accused.<sup>212</sup> The court in *Jensen* stated that whilst the prosecutor alone bears the responsibility for deciding whether a person will be called as a prosecution witness,<sup>213</sup> in some cases “prophylactic judicial intervention”<sup>214</sup> would be justified. In the court’s view a trial judge would be entitled to question prosecution counsel about his or her decision not to call a material witness and any prosecutorial assessment that the witness was truly unreliable.<sup>215</sup> A trial judge could additionally, if so minded, “suggest” that the prosecutor reconsider his or her decision not to call the witness and “remind” the prosecutor of his or her duty to be satisfied that the witness was truly unreliable (say by “proofing” the witness).<sup>216</sup>

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<sup>209</sup> *R v Sandford* (1994) 72 A Crim R 160 at 185.

<sup>210</sup> [2009] VSCA 266.

<sup>211</sup> See *DPP v Jensen* [2007] VSC 77.

<sup>212</sup> The trial judge, Osborn J, accepted that the prosecutor had been entitled to view the brother as an unreliable witness. The defence’s motivation was not for the brother to be called as a witness of truth but rather to attack him as a liar and enliven suspicion about his role and for “the Crown or the court to set up a straw man, which the defence can then knock down to both distract or detract from the Crown [case]” [2007] VSC 77 at [21]. On this view the defence’s motivation as respects the brother’s testimony is questionable. See the similar criticism offered in the English case of *R v Bradish & Hall* [2004] EWCA Crim 1340, see further Chapter 9, n 255. However, the Court of Appeal (*R v Jensen* [2009] VSCA 266), taking a similar strict view as in *Kneebone*, disagreed with Osborn J and found that the prosecution had not been entitled to view the brother as unreliable. With respect to the Court of Appeal this conclusion appears questionable.

<sup>213</sup> [2009] VSCA 266 at [60].

<sup>214</sup> [2009] VSCA 266 at [62].

<sup>215</sup> [2009] VSCA 266 at [61].

<sup>216</sup> [2009] VSCA 266 at [61].

[8.6.21] The court in *Jensen* went as far as to state that if the trial judge considered that the prosecutor’s refusal to call the witness “is not or may not be soundly based” then the judge could make that clear to the prosecutor and remind the prosecutor of the option of calling the witness purely for the defence to cross-examine.<sup>217</sup> I would suggest that *Jensen* further confines the prosecution’s already circumscribed discretion in Australia and must be regarded as at least qualifying, if not undermining, the clear admonition from the High Court in *Apostilides* that a trial judge should not “adjudicate” on the sufficiency of the reasons advanced by a prosecutor for not calling a witness.

[8.6.22] It also seems apparent that the High Court’s caution in *Apostilides* that a judge should not “adjudicate” on the adequacy of the reasons offered by a prosecutor for a decision in calling a witness may well be overlooked by an appellate court. If the explanation offered by the prosecutor for not calling a witness is found to be inadequate then it is open for the court to conclude that the prosecutor has wrongly exercised his or her discretion and that the absence of that witness at trial amounts to a “miscarriage of justice.”<sup>218</sup>

## Part 7: *R v Dyers*: The Culmination of the Minister of Justice Approach

[8.7.1] These significant fetters already imposed on the prosecution’s discretion in its choice of witnesses were even further tightened by the decision in 2002 of the majority of the High Court (Gaudron, Hayne, Kirby and Callinan JJ; McHugh dissenting) in *R v Dyers*.<sup>219</sup> This decision at first glance may not appear to be entirely on point as it dealt with the circumstances in which a so called *Jones v Dunkel*<sup>220</sup> adverse inference could be drawn from the failure of the defence to call a potential defence witness at trial. This is a rule of practice that McHugh J in *Dyers* defined as “a principle that criminal lawyers have preached for nearly 200 years. It is the principle that, if the jury think that the accused should have called a witness and there is no satisfactory explanation for the failure to call the witness, the jury are entitled to draw the inference that the evidence of the witness would not have assisted the accused.”<sup>221</sup> But in considering the scope of the circumstances, if any, in which such an inference could be drawn from the failure of either the prosecution<sup>222</sup> or the defence to call a material witness, four of the five members of the High Court offered some important, if not wholly consistent, observations about the

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<sup>217</sup> [2009] VSCA 266 at [61].

<sup>218</sup> See, for example, as happened in *R v Wilson* [1998] 2 Qd R 599 and *R v Jensen* [2009] VSCA 266.

<sup>219</sup> (2002) 210 CLR 285 at 298.

<sup>220</sup> (1959) 101 CLR 298.

<sup>221</sup> (2002) 210 CLR 285 at 298. As McHugh J notes the so called *Jones v Dunkel* principle is longstanding and the rule can be traced back to, at least, 1820, see *R v Burdett* (1820) 4 B & Ald 95 at 161-162. See also *R v Buckland* [1977] 2 NSWLR 452 and *R v Sandford* (1994) 72 A Crim R 160 for applications of the rule in criminal cases.

<sup>222</sup> In *R v Apostilides* (1983) 154 CLR 563 at 575 the High Court had accepted that the rule in *Jones v Dunkel* was also capable of extending to the failure of the prosecution without good explanation to call a witness that it ought to have called. See *R v Orchard & Orchard* (1838) 8 Car & P 559, n B and 568 cited in Chapter 7, n 74, for an early example.

prosecutorial obligation in calling witnesses at trial.<sup>223</sup> In fact in their decisions, the majority virtually discarded the rule in *Jones v Dunkel* in so far as it could be applied to the failure of the defence to call a witness whom they might have been reasonably expected to have called.<sup>224</sup> Gaudron and Hayne JJ in their joint judgment also greatly restricted the circumstances in which the rule could be invoked against the prosecution.<sup>225</sup> This concession is, however, likely to be of scant comfort to prosecutors in Australia when the full implications of the majority judgments are considered so far as they deal with the obligations of the prosecution in calling witnesses at trial.

[8.7.2] In *Dyers* the accused was the leader of a cult and had been charged with the indecent assault of the eleven year old daughter of a member of the cult. The victim asserted that she had been molested during an “energy conversion session” conducted by the accused. Dyers maintained that he had only seen the victim and her mother at a later meeting that same day. A purported diary entry to this effect was produced on Dyer’s behalf that named several other persons who had also been in attendance. At the time of the alleged assault Dyers insisted that he had being with a woman called Wendy Tickler. Neither the persons named in the diary nor Tickler were called by the prosecutor or defence at trial. The prosecutor commented in his closing address on the absence of these persons as defence witnesses and suggested that the reason they had not been called was “because they would not be of assistance to the defence case.”<sup>226</sup> In accordance with *Jones v Dunkel*, and over the objections of defence counsel, the trial judge had instructed the jury that it was open for them to draw an adverse inference against the accused arising from the failure of the defence to have called these witnesses.

[8.7.3] The majority of the High Court was of the view that to allow the jury to draw an adverse inference against Dyers for his “failure” to call either Tickler or the persons named in the diary in accordance with *Jones v Dunkel* was objectionable for two main reasons. First, to allow the jury to draw an adverse inference from the failure to call a witness “misstated the accusatorial nature of the [criminal] trial”<sup>227</sup> and the suggestion that the defence may be expected to either give<sup>228</sup> or call evidence is wrong in principle and undermines the presumption of innocence and detracts from the fundamental requirement that the prosecution has to prove its case beyond reasonable doubt.<sup>229</sup>

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<sup>223</sup> Gaudron and Hayne JJ, McHugh J and Callinan J. Kirby J dealt with the appeal without having regard to the prosecutorial role in calling witnesses. He merely stated he agreed with both the judgments of Gaudron and Hayne JJ and of Callinan J.

<sup>224</sup> Contrast *R v Khan* [2000] EWCA Crim 486 for a recent statement of the law in England on this issue.

<sup>225</sup> See (2002) 210 CLR 285 at 295. It should be noted that this restriction was viewed as *obiter* and was not accepted by the New South Wales Court of Appeal in *R v Riscuta & Niga* [2003] NSWCCA 6 at [99]-[103]. However, for a contrary view which accepts that the view of Gaudron and Hayne JJ is binding on this point, see *R v Winning* [2003] WASCA 245 at [7], [111] and [259], *Police v Kyriacou* (2009) 103 SASR 243 at [15] and [62]-[63] and *R v Nguyen* [2009] SASC 91 at [47]. See further Papamatheos, A, “Can an inference still be drawn against the Crown for failure to call a material witness?” (2006) 30 Crim LJ 24.

<sup>226</sup> (2002) 210 CLR 285 at 320.

<sup>227</sup> (2002) 210 CLR 285 at 306 per Kirby J.

<sup>228</sup> See *R v RPS* (2000) 199 CLR 620 and *R v Azzopardi* (2001) 205 CLR 50. cf *R v Weissensteiner* (1993) 178 CLR 217.

<sup>229</sup> It will be argued that the majority of the High Court in *Dyers* fell into error in this proposition and that the dissenting view of McHugh J is to be preferred. See further the discussion of this issue in Part 10 of Chapter 10.

Second, any expectation upon the defence to call a witness fails to take account of the wide duty arising from the role of prosecution counsel as a minister of justice to call any credible material witness regardless of their value to the prosecution case. McHugh J dissented from his colleagues.

### **Part 8: Dyers: The Prosecutor’s Minister of Justice Role in calling Witnesses, Doing the Defence’s Work?**

[8.8.1] In reaching their conclusion Gaudron and Hayne JJ and Callinan J invoked the minister of justice role of the prosecutor in the calling of witnesses as justification for discarding the rule in *Jones v Dunkel* in so far as it applied to the defence. Gaudron and Hayne JJ explained that any expectation as to which party should call a witness at trial had to take into account the obligations of the prosecution as a minister of justice in this area. As their Honours noted, “If persons are able to give credible evidence about matters directly in issue at the trial, those facts, standing alone, would ordinarily suggest that the prosecution should call them.”<sup>230</sup> The mere fact that a witness would give an account inconsistent with the prosecution case was not a sufficient reason for the prosecution not to call that person.<sup>231</sup> Gaudron and Hayne JJ reasoned that if the prosecution were required to call any credible and material witness then how could there remain any scope for an adverse inference to be drawn from the failure of the defence to call such a witness? The defence were neither expected nor required to call such a witness.<sup>232</sup>

[8.8.2] Callinan J agreed that it was wrong to draw an adverse inference against an accused for failing to call a potential witness. His Honour explained that whilst the onus was with the prosecution to prove a defendant’s guilt, it was not entitled to do so at any, and all, costs. It had to be remembered that the prosecutor was “a minister of justice bound to call all material witnesses: and that there can be no obligation of any kind upon the accused to prove, or bring forward anything.”<sup>233</sup>

[8.8.3] However, the High Court disagreed as to whether Tickler or the persons named in the diary were material witnesses whom the prosecution should have called. McHugh J considered that Tickler was not a material witness as she neither supported the prosecution case nor was a witness to the events giving rise to the alleged offence. Gaudron and Hayne JJ considered that neither Tickler nor the persons named in the diary were material witnesses. “Their evidence was not necessary to unfold the narrative and give a complete account of the events upon which the prosecution [was] based.”<sup>234</sup> Callinan J disagreed and went well beyond the view of McHugh J and even Gaudron and Hayne JJ in defining what constituted a material witness to be called by the prosecution.<sup>235</sup> Callinan J was of the view that the prosecution should not only have called

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<sup>230</sup> (2002) 210 CLR 285 at 292.

<sup>231</sup> (2002) 210 CLR 285 at 293.

<sup>232</sup> (2002) 210 CLR 285 at 293. See also *R v RPS* (2000) 199 CLR 620 at 632-633.

<sup>233</sup> (2002) 210 CLR 285 at 327.

<sup>234</sup> (2002) 210 CLR 285 at 295 quoting *R v Whitehorn* (1983) 152 CLR 657 at 674 per Dawson J.

<sup>235</sup> Indeed, I would suggest that Callinan J went further than any judge since the expansive comments of Wright J in *R v Holland* (1896) 30 Ir Law Times 395 in 1896 as to the prosecutor’s responsibilities in calling witnesses.



Tinkler but even the persons named in the diary, notwithstanding the fact that Tinkler, at least, was a defence alibi witness. The prosecution were under an expansive, if not extraordinarily wide, duty to call any material witness. Callinan J referred to the proposition in *Apostilides* that the prosecutor should ordinarily call any witness named on the back of the indictment. His Honour, drawing on this expression, observed:

There is no universal current practice with respect to the nomination of witnesses on an indictment. The reference to it [in *Apostilides*] should be taken to be a reference to reasonably available material witnesses. The obligation of the prosecution is to call all material witnesses. Whilst counsel and judges should be vigilant to ensure that trials are not needlessly prolonged, 'material' in this field of discourse should not be given any narrow meaning. A witness will not cease to be a material witness merely because he or she is a witness to a relevant circumstantial matter or event. The persons whom it was implied by the trial judge that the appellant should have called were material witnesses, because evidence from them could have borne upon the movements and activities of the complainant at the time of the alleged commission of the offence. A broad practical view of materiality should be taken. All the available admissible evidence which could reasonably influence a jury on the question of guilt or otherwise of an accused is capable of answering the description 'material'. The fact that the prosecution saw fit to comment on the absence of the potential witnesses forecloses any argument by the [Crown] that they were not material witnesses or were not available, and provides a clear indication that if it was for anyone to call them, it was, as indicated by *Apostilides*, for the prosecution to do so.<sup>236</sup>

[8.8.4] The ramifications of this view are profound. The thrust of Australian authority since *Whitehorn* and culminating in the views of Gaudron and Hayne JJ in *Dyers*, had already placed strict and, some might say, impracticable restrictions on the prosecution's discretion as to how it would prove its case. But the approach advanced by Callinan J goes even beyond the requirements imposed by decisions such as *Shaw* and *Kneebone*. It would appear that the sound counsel given by the High Court in *Richardson* to avoid imposing inflexible rules of practice concerning how the prosecution should exercise their task of deciding what witnesses to call was conspicuously overlooked. However, the ramifications of the approach advanced by Callinan J go even further than the previous cases and are tremendous. I would submit that the obligations imposed upon prosecutors by Callinan J are unworkable and would effectively blur the fundamental distinction between a common law adversarial criminal model and a civil law inquisitorial criminal model. It would effectively leave the prosecutor with little practical discretion or power as to either how to present his or her case at trial or what witnesses to call. A criminal trial is not an inquisition or an open ended search for the truth. Rather it is an adversarial process, a contest between the accused and the prosecution, in which it is for the prosecutor as a party to that process to decide how to adduce his or her case and what witnesses to call.<sup>237</sup>

[8.8.5] The wide proposition of Callinan J effectively disregards this adversarial model. It imposes an onerous obligation on the prosecution, not only to adduce witnesses who are unhelpful or inconsistent with its case, but also by drastically extending the concept of materiality risks witnesses of marginal or peripheral significance being tendered by the

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<sup>236</sup> (2002) 210 CLR 285 at 326-327.

<sup>237</sup> *R v Ratten* (1974) 131 CLR 510 at 517. See also *Police v Kyriacou* (2009) 103 SASR 243 at [4] per Grey J.

prosecutor and being required at trial.<sup>238</sup> When the whole thrust of recent government and judicial efforts has been to control and restrict the ever increasingly costly and elaborate nature of modern criminal trials and to seek to confine the issues in dispute,<sup>239</sup> the proposition advanced by Callinan J would produce entirely the opposite effect. For the prosecution to call such witnesses as Tickler and the alibi witnesses would have the potential to lengthen and complicate trials and take the issues into unnecessary and collateral areas. In particular I would suggest that Callinan J’s proposition would be likely to result in confusion to juries as to what the prosecution was trying to prove. This was the fear expressed in the English cases such as *Nugent*.<sup>240</sup> Any jury would be bewildered at the prosecution being required to call as part of its case alibi or other witnesses whose testimony would contradict what the prosecution was seeking to prove. The view of Callinan J in *Dyers* ignores the sound maxim expressed in *R v Novac*<sup>241</sup> by the Court of Appeal: “In jury trial brevity and simplicity are the handmaidens of justice, length and complexity its enemies.”<sup>242</sup>

[8.8.6] It was already apparent that the line of authority in Australia starting from *Whitehorn* and culminating in *Dyers*, even without the comments of Callinan J in *Dyers*, had diluted the adversarial model of criminal procedure as defined by Barwick CJ in *Ratten* that had emphasised that in an adversarial process it was for the parties to the proceedings to present their cases as they saw fit. Any “discretion” or latitude on the prosecution that had been conferred and recognised in both the historical cases such as *Whitehead* and *El Dabbah* and modern Australian cases as *Richardson* and *Van Beelen* had been greatly restricted by the various decisions following *Whitehorn* that had invoked the minister of justice role of the prosecuting lawyer in calling witnesses in quite prescriptive terms. Those decisions have had the effect of requiring the prosecution to at least carefully consider, if not actually, call, unhelpful, hostile or inconsistent witnesses as part of the prosecution case or even witnesses who might prove the defence case. In Australia the prosecutor cannot leave such witnesses to be called by the defence. Even a defence alibi witness such as Tickler might fall to be called by the prosecution. In *Dyers* McHugh J was confident that the law in Australia had not yet reached the unsatisfactory point where:

...the prosecutor must call every witness who may support any affirmative case that the prosecution thinks the accused might run. The cards are not yet stacked so heavily against the prosecution that it has a duty to call every witness that might support any affirmative case the accused might put forward.<sup>243</sup>

[8.8.7] In a rational adversarial system of criminal justice the confidence expressed by McHugh J would seem logical. How could the prosecutor be expected to call a witness who would be expected to further the defence case? Yet, when one notes the

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<sup>238</sup> See further the discussion in Part 10 of Chapter 10 at [10.10.8].

<sup>239</sup> See, for example Hunter *et al*, Ch 4, n 19, 712-716 and Auld, Ch 2, n 333, Ch 1 and 2. See further the discussion in Chapter 4, n 19.

<sup>240</sup> *R v Nugent* [1977] 3 All ER 662. See further the discussion in Part 5 of Chapter 9.

<sup>241</sup> (1976) 65 Cr App R 107.

<sup>242</sup> (1976) 65 Cr App R 107 at 119.

<sup>243</sup> (2002) 210 CLR 285 at 301.

development in Australia since *Whitehorn* of the prosecutor's minister of justice role in calling witnesses and, especially, the ramifications of the view of the law expressed by Callinan J in *Dyers*, I would suggest that the confidence expressed by McHugh J may prove to be premature and misplaced. If the extraordinary obligations imposed on the prosecutor by Callinan J in *Dyers* are accepted then the prosecutor may effectively, in due course, be placed in the difficult position in an adversarial system of being expected to both defend as well as prosecute. It does appear that the recent Australian decisions, especially cases such as *Kneebone*, *Shaw* and *Jensen* and the observations of Callinan J in *Dyers*, have overlooked the simple but compelling proposition stated by Diplock LJ in *Dallison v Caffery*, namely that it was not the duty of a prosecutor to place before the court all evidence known to him, whether or not it was probative of the guilt of the accused person. The prosecutor's duty after all is to prosecute and not to defend.<sup>244</sup>

[8.8.8] It is my argument that the minister of justice role in calling witnesses as expressed by the High Court in *Dyers* can be criticised in several crucial respects. First, as this and Chapter 7 have shown, *Dyers* is the culmination of a line of Australian authority since 1983 that has consistently misapplied the previously settled view of the law arising from both the historical cases such as *Woodhead* and *El-Dabbah* and the more recent Australian cases predating 1983 such as *Richardson* and *Van-Beelen*. Second, the minister of justice role as expressed in recent Australian cases such as *Shaw*, *Kneebone* and *Dyers*, unnecessarily confines the prosecutorial role and fails to reflect the adversarial nature of the modern criminal process and the fact that the prosecution has a legitimate and proper function in seeking the conviction of the accused. Third, the approach in *Dyers* has been overtaken by developments in criminal procedure, notably the modern duty of prosecution disclosure (as discussed in Chapters 5 and 6) and pre-trial management and such a demanding duty on the prosecution is unnecessary to protect the rights of the accused or to ensure a fair trial. These assertions will be considered in greater length in Chapters 9 and 10.

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<sup>244</sup> [1964] 2 All ER 610 at 622. See also *R v Brown* [1997] 3 All ER 769 at 777.

# CHAPTER 9

## CALLING WITNESSES IN ENGLAND, THE MODERN APPROACH: MORE CONFUSION OR TOWARDS A FAIR AND WORKABLE SOLUTION?

*This Chapter considers the modern development of the prosecutorial role in calling witnesses in England. It shows that the tensions present in the historical cases as to the scope of the prosecution's discretion in calling witnesses have persisted in inconsistent modern English decisions on this issue. The prosecution's adversarial role in calling witnesses, as apparently ultimately settled by the historical cases discussed in Chapter 7, was heavily qualified in R v Oliva which appears to represent a return to the minister of justice approach. Though some subsequent cases have applied Oliva, others have recognised a wider degree of prosecution discretion and the most recent English cases appear to represent a return to the prosecutor's adversarial role. This Chapter traces this trend, linking it to recent developments in criminal procedure, notably the formulation of the prosecution's modern duty of disclosure as discussed in Chapter 5. It is argued that such developments justify and support the prosecution's adversarial role in calling witnesses. Accordingly, although Oliva may still ostensibly represent the law in England, the adversarial role appears consistent with present practice.*

### Part 1: Introduction

"It appears to becoming increasingly popular for defence advocates to seek to appeal to this court in cases where the main ground of appeal is that the judge wrongly refused to direct the prosecution to call a witness whose statement had been included in the committal bundle."<sup>1</sup>

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<sup>1</sup> *R v Brown & Brown* [1997] 1 Cr App R 112 at 113.

[9.1.1] This observation from Schiemann LJ in 1996 illustrates that the courts in England in “modern” times have continued to be troubled by defence complaints about the failure of the prosecution to call at trial a witness named on the back of the indictment. As in Australia, appeals have related to the failure of the prosecution to call a witness who is not even named on the indictment,<sup>2</sup> the prosecution calling a witness who is named on the indictment<sup>3</sup> and at the prosecution’s failure to call a witness who is seemingly even damaging to the defence case.<sup>4</sup> Such continuing complaints are surprising for two fundamental reasons.

[9.1.2] First, the controversy about the prosecutorial role in calling witnesses should arguably have been resolved by the *Woodhead*, *Cassidy* and *El Dabbah* line of authority. The historical cases, as was explained in Chapter 7, had ultimately resolved the debate as to the prosecutorial role in calling witnesses in favour of the adversarial role and had rejected any “minister of justice” duty in calling witnesses regardless of their reliability or value to the prosecution case. Secondly, the significance of the prosecution’s role in calling witnesses in the modern criminal trial has diminished. The accused now has comprehensive rights relating to disclosure of the prosecution case and any “relevant” unused material<sup>5</sup> and to full legal representation. Such rights were lacking at the start of the nineteenth century.<sup>6</sup> Although it is still arguable that there is not an absolute “equality of arms” between prosecution and defence owing to the disparity in resources between them,<sup>7</sup> it is clear that the modern accused is not under the same disabilities as the typical accused of the early nineteenth century.<sup>8</sup> The adversarial nature of the modern criminal trial is on a far more equal footing than that of two centuries ago. The modern accused, unlike his or her historical counterpart, need not be reliant upon the prosecution calling a material witness whose testimony may benefit<sup>9</sup> the defence case at trial. If the prosecution do not intend to call a potential material witness, the modern accused should be aware of the details of such a witness and their probable evidence. The defence are at liberty to call such a witness themselves. Even if the witness the prosecution is reluctant to call is named on the back of the indictment, there is no “property in a witness” and the defence is perfectly entitled to approach such a witness with a view to calling him or her themselves.<sup>10</sup>

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<sup>2</sup> See, for example, *R v Richardson*, (1994) 98 Cr App R 174 and *R v Litchfield* [1998] Crim LR 508.

<sup>3</sup> See, for example, *R v Cairns, Zaidi & Chaudhary* [2003] 1 Cr App R 38 and *R v James* [2002] EWCA Crim 1119.

<sup>4</sup> See *R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828, *R v Bradish & Hall* [2004] EWCA Crim 1340 and *R v P* [2005] EWCA Crim 32.

<sup>5</sup> See the discussion in Chapters 5 and 6.

<sup>6</sup> See the previous discussion in Part 5 of Chapter 2.

<sup>7</sup> See, for example, Moynihan, Ch 1, n 23, 28-29 and 90. See also the discussion in Part 9 of Chapter 5 at [5.9.2].

<sup>8</sup> See the previous discussion in Part 10 of Chapter 4.

<sup>9</sup> There will be situations where the defence will prefer the Crown to call even a witness apparently unhelpful to their cause as in *R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828 at 833. See further Part 1 of Chapter 7 at [7.1.11]-[7.1.13].

<sup>10</sup> Indeed the defence are, in theory at least, entitled to speak to any witness named on the indictment, whether that witness is to be definitely called by the prosecution or not.

[9.1.3] The debate as to the extent of the prosecutorial duty in calling witnesses continues because, as noted in Chapter 7, considerable practical and tactical advantages may still accrue to an accused from requiring the prosecution to call or tender all material witnesses. The defence may lack the resources or inclination to call the witnesses.<sup>11</sup> It may prove easier to cross-examine a witness than to examine him or her in chief.<sup>12</sup> Nevertheless, one might have thought that the modern prosecutor would be entitled to shrug off continuing defence demands. Apart from the modern developments in the vital area of prosecution disclosure, the fundamental proposition that clearly emerged from the historical cases, despite their many inconsistencies, was the recognition that the prosecution possessed a broad discretion in its choice of witnesses at trial. The existence of any “minister of justice” duty to call or tender all the witnesses named on the back of the indictment, regardless of their worth or value to the prosecution case was rejected. Indeed, Lord Parker CJ in *Oliva* acknowledged the continued applicability of the *Woodhead* and *El Dabbah* line of authority to the apparent effect that the prosecution could not be compelled or expected to call witnesses they did not wish to call. “The only sensible rule” as Alderson B had remarked in *Woodhead*, was that the party desiring the testimony of a particular witness should call that witness.<sup>13</sup> Yet this simple and practical formula continues to be overlooked by modern English courts, ironically starting with Lord Parker CJ in the course of *Oliva* itself. The principles to be drawn from the historical cases, as stated at the conclusion of Chapter 7, may seem clear and capable of straightforward application, but in England, as in Australia, there has been both ongoing inconsistency in judicial approach and a continuation of the familiar tension between the competing minister of justice and adversarial roles of the prosecutor in this area.

[9.1.4] There is little doubt that the prosecutorial decision as to the calling of witnesses at trial calls for greater deliberation and thought on the part of the modern prosecutor than that which may have been exercised by his or her historical counterpart during the period from 1823 to 1964. However, despite the ongoing inconsistency in judicial approach and tension in prosecutorial roles, there are indications that this issue may be acquiring less practical significance in England (unlike the apparent situation in Australia)<sup>14</sup> and that a sensible, workable and fair solution to this long running issue may have emerged.

## Part 2: *R v Oliva*: A Misguided Direction?

[9.2.1] The crucial decision of the Court of Appeal in *R v Oliva* in 1965 represents the natural starting point in any consideration of the modern English law as to the prosecutorial role in the calling of witnesses.<sup>15</sup> The circumstances of this case are instructive. The accused had

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<sup>11</sup> See Part 1 of Chapter 7 at [7.1.11]–[7.1.13].

<sup>12</sup> See Part 1 of Chapter 7 at [7.1.11].

<sup>13</sup> (1847) 2 Car & Kir 520.

<sup>14</sup> This issue seems prominent in Australia to judge from the number of appeals there featuring complaints of the prosecution’s purported “failures” to call witnesses, see further the discussion in Part 6 of Chapter 8.

<sup>15</sup> In another important “modern” decision, *R v Russell-Jones* [1995] 3 All ER 239 at 242, both prosecution and defence counsel agreed that the “most helpful statement of the law” was to be found in *Oliva*.

been convicted at trial of a serious offence of violence. A doorman called Routledge had been attacked by two men outside an establishment in Soho called the “Bamboo Club.” The prosecution case was almost entirely reliant upon the evidence of three girls present at the scene who were “carrying on the well known occupation of hostesses at the Bamboo Club.”<sup>16</sup> They had described the accused as one of the two attackers. Routledge had originally made a statement to the police that had implicated the accused as one of the attackers. In initially giving evidence at the “old style” committal hearing Routledge had adhered to this account. However, after giving evidence and with the committal hearing incomplete Routledge abruptly recanted and claimed that he had been threatened by the police and the accused was not an attacker. Suspiciously, another prosecution witness, a doorman called Hampden, took the same “remarkable course.”<sup>17</sup> Hampden had also been expected to incriminate the accused. But the day before he was due to give evidence at the committal (in answer to a summons) Hampden claimed that the accused was not one of the attackers. Hampden adhered to this version at committal and Routledge was recalled and now claimed in evidence that he had actually not seen who had attacked him. The accused was committed (and later convicted) on the evidence of the three hostesses, but both Routledge and Hampden remained named as prosecution witnesses.<sup>18</sup>

[9.2.2] In the ordinary course of events Routledge and Hampden might have been expected to have been called as prosecution witnesses at the trial. After all as Routledge was the victim of the attack he would ordinarily be considered an essential witness. However, the prosecutor, for reasons that are readily apparent,<sup>19</sup> refused to call either Routledge or Hampden. The trial judge refused to intervene. The defence accordingly lost the tactical advantage of being able to cross-examine these witnesses and were placed in the “difficult position”<sup>20</sup> of having to call Routledge and Hampden themselves. Both were cross-examined to “considerable effect”<sup>21</sup> by the prosecutor and Routledge was confronted with his prior inconsistent accounts to the police and at committal. Neither would have been likely to strike the jury as the most reliable of witnesses.

[9.2.3] On appeal the defence contended that the prosecution were under a duty to call any witness named on the back of the indictment. This was said to be “the traditional and constitutional practice, and, indeed, the only practice which will ensure a fair trial.”<sup>22</sup> Alternatively, it was argued that if the prosecutor did possess a discretion, it was a discretion that had to be “judicially exercised”<sup>23</sup> in a manner so as not to place the defence at a

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<sup>16</sup> [1965] 3 All ER 116 at 117.

<sup>17</sup> [1965] 3 All ER 116 at 118.

<sup>18</sup> Though not expressly stated it would seem Lord Parker CJ thought that the two witnesses had been intimidated (or “got at” or “nobbled” to use the colloquial expressions).

<sup>19</sup> Both witnesses were plainly unreliable given the abrupt and remarkable changes in their accounts.

<sup>20</sup> [1965] 3 All ER 116 at 119.

<sup>21</sup> [1965] 3 All ER 116 at 119.

<sup>22</sup> [1965] 3 All ER 116 at 119.

<sup>23</sup> [1965] 3 All ER 116 at 122.

disadvantage. Accordingly, it was argued that the prosecutor should have called or tendered Routledge and Hampden. The defence submission as to the prosecutorial duty in calling witnesses accords with the minister of justice role as suggested by Lord Hewart CJ in *Harris and Humphreys J* in *Treacy*.

[9.2.4] The Court of Appeal rejected the defence submission. According to Lord Parker CJ, the prosecutor had been “absolutely entitled” to conclude that both Routledge and Hampden were “wholly unreliable and that the interest of justice would not be furthered by calling such witnesses.”<sup>24</sup> This conclusion is in conformity with the established principle that the prosecution need not call any witness named on the back of the indictment who is considered unreliable or unworthy of trust.<sup>25</sup> It would have been irrational for prosecution counsel in *Oliva* to have called such manifestly unreliable witnesses as Routledge and Hampden at trial. Even a witness who is as essential as the victim can be dispensed with if he is as implausible as Routledge. There may have been “obvious advantages”<sup>26</sup> to the defence in *Oliva* that the witnesses were called by the prosecution. The defence were placed at a tactical disadvantage by being compelled to call the two witnesses themselves and lost the tactical advantage of cross-examination, but their assertion that the prosecution should have called the witnesses raises the question of whether it is appropriate in an adversarial criminal process to seek to redress such perceived prejudice to the defence by compelling the prosecutor to call such dubious witnesses.<sup>27</sup>

[9.2.5] In reaching its conclusion in *Oliva* the Court of Appeal took the opportunity to refer to some of the historical authorities discussed in Chapter 7 and to offer some observations of general application. Lord Parker CJ explicitly recognised the continuing authoritative status of *Woodhead* and *Cassidy* and indicated that those cases and *El Dabbah* accurately stated the present law. Indeed, the Lord Chief Justice stated that any prior judicial comments that all witnesses should be called by the prosecution, whether they were for or against the prosecution, were not to be taken as binding propositions. Rather they were no more than mere “reminders.”<sup>28</sup> This portion of Lord Parker’s judgment constitutes a clear confirmation of the adversarial aspect of the prosecutor’s wide discretion in calling witnesses. However,

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<sup>24</sup> [1965] 3 All ER 116 at 122.

<sup>25</sup> Despite the view expressed by Wright J in *R v Holland* (1896) 30 Ir Law Times 395 it is settled law that the prosecution need not call an unreliable or incredible witness at trial, see *R v Bryant & Dickson* (1946) 31 Cr App R 146, *R v Collier* [1958] Crim LR 544, *R v Tregear* [1967] 1 All ER 989 and *R v Lawson* [1960] VR 37 at 40.

<sup>26</sup> WG, “Commentary [to *R v Oliva*]” [1965] Crim LR 496. Unless the judge had declared Routledge and Hampden hostile the jury would have been left only with their accounts favourable to the accused and the prosecution would have been unable to have put their prior inconsistent accounts to them in cross-examination. As the defence called them the prosecution were able to cross-examine them as to their prior inconsistent accounts. See *Ibid*.

<sup>27</sup> See *Ibid*. See also *R v Baldwin*, *The Times*, 3 May 1978, for another example of where this happened. See further below n 59 and the discussions in Part 4 of this Chapter and Part 1 of Chapter 11 at [11.1.11].

<sup>28</sup> [1965] 3 All ER 116 at 120 It is unclear what Lord Parker CJ meant by this cryptic term. It may be that the Lord Chief Justice had in mind the same point, as was later made by the High Court of Australia in *R v Richardson* (1974) 131 CLR 116 at 121 that any comments in the historical cases concerning the witnesses to be called by the prosecution were intended purely as helpful guidance and were not intended to enunciate any rules which would fetter the discretion of the prosecutor, see further the discussion in Part 3 of Chapter 8 at [8.3.5].



Lord Parker, like Lord Roche before him in *Seneviratne* (and various judges of the High Court in Australia subsequently), proved unable to resist the temptation to offer some general guidance to prosecutors as to how they should approach their choice of witnesses. After an examination of the contradictory previous authorities, Lord Parker concluded that:

... it seems to this court, that the principles are plain. The prosecution must of course have in court those witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief, then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interests of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge to interfere and in his discretion to invite<sup>29</sup> the prosecution to call a particular witness and if they refuse there is the ultimate sanction in the judge himself calling the witness.<sup>30</sup>

[9.2.6] This passage has proved influential in the subsequent development of the law. However, on close scrutiny it proves both confusing and contradictory. Initially Lord Parker refers to the broad discretion of the prosecutor in calling witnesses in terms that are consistent with cases such as *Woodhead* and *El Dabbah*. However, he then qualifies this approach with the conflicting statement that the prosecutor is under a duty to call any credible witness named on the indictment, even if that witness is unhelpful or inconsistent with the prosecution case. It is only if a witness cannot be regarded as capable of belief that the prosecutor is entitled to decline him or her. This second part of Lord Parker's conclusion is at variance with the clear views expressed in the *Woodhead* and *El Dabbah* line of authority which leave the prosecution free to select their own witnesses and present their case as they see fit. Having earlier in his judgment explicitly recognised the continued authority and applicability of those cases, the Lord Chief Justice then fails to apply them fully. Instead he hedges that recognition with the countervailing duty imposed on prosecutors in the second portion of his conclusion quoted above. It would appear that Lord Parker CJ may

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<sup>29</sup> The use of the term "invite" is significant and would suggest that the court cannot compel or order the prosecutor to call a particular witness. Though it has been argued that this issue is "...perhaps, of little practical importance as most counsel would treat an 'invitation' from the judge to call a witness as being virtually equivalent to a command, even if it is not expressed as such" (Murphy (*Blackstone*, 2005 edition), Ch 2, n 87, 1528 at [D14.8]). This view overlooks a point of considerable importance. In an adversarial criminal justice system the ultimate responsibility as to the selection of the witnesses to call as part of the prosecution case is for the prosecutor. The judge may be entitled to express an "invitation," but persuasive as any such indication may be, the final decision as to calling a witness should logically be for the parties to the case, namely the prosecution and the defence. As Munday notes in relation to the prosecutor's choice of witnesses, "It is traditionally not part of the judicial office, then to dictate to the Crown whom not to call and it is clear in this context, courts have been reluctant to meddle in the Crown's exercise of its prosecutorial discretion," see Munday, R, "Calling a Hostile Witness" [1989] Crim LR 866 at 872. Munday's observation would apply equally to witnesses to be called by the defence. Despite suggestions to the contrary in *R v Sterk* [1972] Crim LR 39 and *R v Witts & Witts* [1991] Crim LR 562 the preferable and stronger view is that a judge has no power to "order" or "direct" a prosecutor to call a particular witness, see the cases cited in Chapter 8, n 105.

<sup>30</sup> [1965] 3 All ER 116 at 122.

have fallen into the same unwitting trap, as befell Lord Roche in *Seneviratne*, of trying to combine the conflicting minister of justice and adversarial advocate roles of the prosecutor in the calling of witnesses. Whatever the explanation for the apparent contradiction in *Oliva*, I would submit that it is impossible to satisfactorily reconcile *Woodhead* and *El Dabbah* with the crucial second part of Lord Parker’s conclusion. I would suggest that the second portion of Lord Parker’s conclusion does not accord with previous authority and the obligation he sought to impose upon prosecutors as to their choice of witnesses was misguided.

[9.2.7] Despite such criticisms *Oliva* has proved influential and Lord Parker CJ’s suggestion that the prosecution is obliged to call any “credible” witness, even if that witness does not further its case has been applied in some subsequent decisions in England that have also confined the prosecution’s discretion to refuse to call a relevant witness to the narrow situation where that witness can be positively dismissed as unreliable or unworthy of belief.<sup>31</sup> Of course such a decision may not prove as obvious as it was in *Oliva*. Few witnesses will be able to be as neatly categorised as wholly unreliable or untruthful as Routledge and Hampden plainly were.<sup>32</sup> The minister of justice role, despite having been apparently rejected in the *Woodhead* line of authority, was effectively, if not unfortunately, given a “new lease of life” by *Oliva*. It can be argued that both *Oliva* and the wider notion of the prosecution as a minister of justice in its choice of witnesses at trial has proved on occasion at least to be a recipe for confusion in practice. The precise extent and scope of the prosecution’s duties in its selection and calling of witnesses at trial has yet to be authoritatively and entirely resolved in England. The tensions as to what prosecutorial role to be followed and the recurring inconsistencies shown in the historical cases discussed in Chapter 7 have persisted.

[9.2.8] However, it is my argument that, notwithstanding, the legacy of *Oliva* and the ongoing inconsistencies in judicial approach, a fair and practical solution has emerged in England. This is the course of action overlooked by Lord Parker CJ in *Oliva* but suggested in 1936 by Hawke J in *Nicholson*. That is, provided the defence are, through the exercise by the prosecution of its modern and comprehensive duty of disclosure, aware of both the identity and the evidence of a potential witness then it is proper for the prosecution not to call that witness and it is then for the defence to decide whether to call such a witness.<sup>33</sup> The prosecution in an adversarial process should have a wide discretion to call only those witnesses it considers are best able to advance the prosecution case. It is not the role of prosecution counsel to perform the functions of both prosecution and defence. If the defence desire an “unused” witness to be called, then in an adversarial process that should be their task. This simple and practicable solution has been proposed, almost in passing, on various

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<sup>31</sup> See, for example, *R v Armstrong* [1995] Crim LR 342.

<sup>32</sup> See also *R v Tregear* [1967] 1 All ER 989 where the two main prosecution witnesses proved unhelpful and hostile in their testimony at the committal. Though both were named on the back of the indictment the prosecutor’s refusal to call them at trial and to rely upon other evidence was upheld by the Court of Appeal applying *Oliva*. Both witnesses were considered unworthy of belief. See also *R v Smith* [2003] EWCA Crim 1240.

<sup>33</sup> As was the situation in *R v Nicholson* (1936) 100 JPN 553, discussed in Part 6 of Chapter 7.

occasions in England.<sup>34</sup> However, to this day it has never been clearly and unequivocally judicially adopted, though increasingly it is used in practice. It is my argument that, as will be explored further in Chapter 10, it should be unequivocally adopted in both law and practice.

### Part 3: The Minister of Justice Role Applied

[9.3.1] A number of cases in England following *Oliva* have applied the familiar role of the prosecution as a minister of justice in its choice of witnesses at trial and have emphasised the strictness of this role.<sup>35</sup> If a witness can give direct evidence of the primary facts and his or her evidence is capable of belief, then a proper exercise of the prosecutorial discretion will normally require him or her to be called by the prosecution.<sup>36</sup> Any discretion on the part of the prosecution to refrain from calling a material witness at trial in accordance with *Oliva* is strictly limited.<sup>37</sup> Nevertheless, it is my argument that these cases should not be treated as a return to the strict minister of justice role in calling witnesses as suggested in some of the historical authorities considered in Chapter 7. Rather the approach taken by the courts in these cases was dictated by the conduct of the prosecutors at trial.

[9.3.2] The 1972 case of *R v Sterk*<sup>38</sup> is illustrative of this. In this case prosecution counsel at trial had refused to call a witness, “U,” who had been named on the back of the indictment. The prosecution had obtained the anticipated evidence of this witness since committal from other witnesses and also regarded U as unreliable and wished to attack him in cross-examination. The reluctance of the prosecutor to call U was understandable as a party is necessarily placed in a difficult position by putting forward as its witness someone it wishes the court ultimately to disbelieve.<sup>39</sup> The defence were required to call U. The defence argued on appeal that the prosecutor had been obliged to at least tender U for cross-examination and that they had been disadvantaged by having to call U themselves. The prosecutor’s omission to call U was criticised by the Court of Appeal and it was held that the trial judge should have ordered<sup>40</sup> the prosecutor to have at least tendered the witness.<sup>41</sup>

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<sup>34</sup> See *R v Richardson* (1994) 98 Cr App R 174 at 177; *R v Haringey Justices, ex parte DPP* [1996] 1 All Er828 at 832 and Birch, D, “Commentary [to *R v Brown and Brown*]” [1996] Crim LR 660.

<sup>35</sup> See *R v Witts & Witts* [1991] Crim LR 562, *R v Balmforth* [1992] Crim LR 825 and *R v Armstrong* [1995] Crim LR 342.

<sup>36</sup> See *R v Balmforth* [1992] Crim LR 825 (this case is not otherwise reported); Court of Appeal, 12 June 1992, Transcript: Marten Walsh Cherer.

<sup>37</sup> See Birch, D, “Commentary [to *R v Balmforth*]” [1992] Crim LR 826.

<sup>38</sup> [1972] Crim LR 391.

<sup>39</sup> An important tactical consideration is that it is far easier to impugn a witness called by the other side than to attack your own witness.

<sup>40</sup> See also on point *R v Witts & Witts* [1991] Crim LR 562. The proposition that the trial judge can “order” the prosecution to call a witness this view is doubtful and has not been followed in subsequent authority. See the discussion in Chapter 8, n 105.

<sup>41</sup> In the event the appeal in *Sterk* was dismissed as the court applied the proviso.

[9.3.3] The suggestion that a judge has the power to “order” a prosecutor to call or tender a witness seems incongruous in an adversarial criminal process and has not been followed in later cases in both England<sup>42</sup> and Australia.<sup>43</sup> However, *Sterk* is an unusual case in that prosecution counsel had actually referred to the anticipated evidence of U in his opening address to the jury. The prosecutor may have been placed in a difficult position but logically he had “crossed the Rubicon” when he had opened the evidence of a witness he did not wish to call. The case arguably depends upon this crucial fact.<sup>44</sup> As a commentator to the decision observed, “Clearly there must come a point beyond which it is not possible for the prosecution to change their mind.”<sup>45</sup> Given its particular facts the result in *Sterk* may well have been the same if either the prosecutor’s minister of justice or adversarial role in calling witnesses were applied.<sup>46</sup>

[9.3.4] The strict compliance of the prosecutorial role as a minister of justice in this area was recently confirmed by the Privy Council in *State v Grant*.<sup>47</sup> This case concerned a fatal shooting in Jamaica. The accused had been convicted of murder. The issue at trial had been one of self-defence. The prosecution had in its possession statements from two direct eye-witnesses, Kinglock and Bryant. Kinglock partly supported the defence case. The evidence of neither witness was adduced at committal and the witnesses were not named on the back of the indictment. However, after committal the prosecution notified the defence of its intention to adduce the evidence of both witnesses at the trial. But at trial prosecution counsel only adduced the evidence of Bryant and refused to adduce the evidence of Kinglock,<sup>48</sup> contending that she was not bound to call witnesses whose names did not appear on the back of the indictment. The defence complained on appeal of the absence of Kinglock’s evidence at the trial.

[9.3.5] The Privy Council considered that the complaint was well-founded. Lord Bingham, delivering the court’s judgment, accepted that “plainly” the prosecution had a discretion in its choice of witnesses at trial.<sup>49</sup> But it was “a discretion to be exercised by the prosecutor

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<sup>42</sup> See *R v Baldwin*, *The Times*, 3 May 1978 and *R v Grafton* [1992] 4 All ER 4 609. See also Chapter 8, n 105.

<sup>43</sup> See the cases cited in Chapter 8, n 105.

<sup>44</sup> See WG, “Commentary [to *R v Sterk*]” [1972] Crim LR 392. See also *R v Foxford* [1974] NI 181.

<sup>45</sup> [1972] Crim LR 392.

<sup>46</sup> See also *R v Witts & Witts* [1991] Crim LR 562 and Birch, D, “Commentary [to *R v Witts & Witts*]” [1991] Crim LR 562-563 for another case whose unusual facts might explain the court’s criticism in that case of the prosecution’s choice of witnesses at trial and its suggestion that the trial judge should have compelled the prosecution to tender a witness for cross-examination on the basis that any assertion that the witness was an incredible witness within *Oliva* could not be sustained.

<sup>47</sup> [2007] 1 AC 1.

<sup>48</sup> As both witnesses were absent from the trial Bryant’s statement was admitted as an exception to the rule against hearsay under s.31D of the Jamaican *Evidence Act 1843* that allowed the statement of an absent witness to be admitted if reasonable efforts to secure the attendance of that witness at trial had proved fruitless. The defence at both trial and on appeal had argued that this provision was unconstitutional. Both courts rejected this argument.

<sup>49</sup> [2007] 1 AC 1 at 16.

acting as a minister of justice, in the interests of fairness.”<sup>50</sup> The prosecutor need not call witnesses who were incapable of belief or whose evidence was immaterial or purely repetitive. But inconsistencies between one prosecution witness and another did not in itself justify the prosecution in refusing to call a material witness.<sup>51</sup> There was no suggestion in this case that either witness could be regarded as immaterial or incapable of belief. Though neither witness appeared on the back of the indictment, the prosecution had made clear its intention to rely on their evidence at trial. Prosecution counsel had mistaken the nature and extent of her discretion in her choice of witnesses at trial.<sup>52</sup> Fairness had required the admission of Kinglock’s statement. It was not an answer on the particular facts of this case for the prosecution to argue that the defence could have adduced Kinglock’s statement.<sup>53</sup> By giving the defence notice post-committal of its intention to introduce the evidence of both witnesses at trial<sup>54</sup> the defence had been taken off guard when the prosecution had led Bryant’s statement but not that of Kinglock.<sup>55</sup>

[9.3.6] It is arguable that the conclusion reached in cases such as *Sterk* and *Grant* can be explained by their particular facts. It was unnecessary for the courts in either case to base their decision on the prosecutorial role of a minister of justice in calling witnesses. In both cases the prosecution had passed the “point of no return.” In view of this, their broad expression and application to the facts of the minister of justice role in calling witnesses is misplaced. It was not simply the minister of justice conception of the prosecutorial role in these cases that was determinative. Rather it was that the conduct of the prosecution itself required that outcome. In addition it is notable that both cases overlook the “adversarial” legacy of the *Woodhead* and *El-Dabbah* line of authority.

#### **Part 4: *R v Oliva* and the Prosecutorial Role as a Minister of Justice in Calling Witnesses: A Recipe for Confusion in Practice?**

[9.4.1] A number of English cases such as *R v Brent*<sup>56</sup> in 1973, *R v Roberts*<sup>57</sup> in 1984 and *R v Grafton*<sup>58</sup> in 1992 highlight the significant practical problems that can arise from both a strict

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<sup>50</sup> [2007] 1 AC 1 at 16.

<sup>51</sup> [2007] 1 AC 1 at 16 quoting *R v Russell-Jones* [1995] 3 All ER 239 at 245 on this point.

<sup>52</sup> [2007] 1 AC 1 at 17.

<sup>53</sup> [2007] 1 AC 1 at 17. This view should be contrasted with the view offered in *R v Nicholson* (1936) 100 JPN 593 (see the discussion in Part 6 of Chapter 7) and the argument that will be outlined in Chapter 10 based on the Canadian decision of *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437.

<sup>54</sup> See also *R v Russell-Jones* [1995] 3 All ER 239 where it was suggested that the notification post-committal by the prosecution to the defence of its intention to lead the evidence of a witness at trial is tantamount to that witness being named on the back of the indictment.

<sup>55</sup> Though not conclusive the Privy Council also noted that the defence would have been reluctant to seek to adduce the statement of Kinglock under s.31D of the *Evidence Act 1843* given that they were arguing that this provision was unconstitutional and they did not wish to undermine this argument.

<sup>56</sup> [1973] Crim LR 275.

<sup>57</sup> (1984) 80 Cr App R 89.

application of *Oliva* and the prosecutorial role of a minister of justice in the calling of witnesses. These cases illustrate the pitfalls that continue to confront prosecutors in deciding upon their choice of witnesses and the continuing tensions between the contrasting prosecutorial roles of both minister of justice and adversarial advocate.<sup>59</sup>

[9.4.2] *Roberts* is a notable illustration of these tensions. Two defendants, Roberts and a man called Evans, had been convicted of the murder of a man called Sands. Each defendant had run “cutthroat” defences at trial and had blamed the other for carrying out the crime. The brother of Roberts’s co-defendant, a Paul Evans (“Paul”), had made significant and apparently incriminating claims to three persons suggesting that he may have been implicated in the murder. This material had been “very properly”<sup>60</sup> supplied by the prosecution to the defence.<sup>61</sup> Though Paul had later dismissed his claims as untruthful and “just bravado,”<sup>62</sup> Roberts’ defence counsel were eager to put the material concerning Paul before the jury as it might undermine the prosecution case against Roberts by suggesting that the two Evans brothers had committed the murder themselves. The prosecution were reluctant to call Paul at trial. He did not assist their case.<sup>63</sup> The prosecution view was that Paul was “not a witness of truth and that he had in fact played no part in the murder of Sands.”<sup>64</sup> However, prosecution counsel, evidently conscious of his role in this area as a minister of justice, stated at the trial that the prosecution “were of course ready to do whatever was desirable in the interests of justice.”<sup>65</sup> If the two defence counsel had been able to agree as to the course to be taken then prosecution counsel would have been happy to comply. The problem that arose was that the respective counsel for Roberts and Evans disagreed. Counsel for Roberts was eager to place the material regarding Paul before the jury and for Paul to be called as a witness, provided that someone else called him.<sup>66</sup> Counsel for

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<sup>58</sup> [1992] 4 All ER 609.

<sup>59</sup> There are a number of Australian cases that also illustrate the tensions and practical problems that can arise from the prosecution being compelled to call witnesses who support the defence case and then seeking to impugn the testimony of such witnesses, see, for example *R v Ashton, Farmer & Randall* [2003] TASSC 140 at [29] per Underwood J (affirmed *R v Randall & Farmer* [2004] TASSC 42), *R v Kennedy* (2000) 118 A Crim R 34 and *R v Teasdale* (2004) 145 A Crim R 345. Though it is arguable that this problem can be overcome by a provision such as s 38 of the *Uniform Evidence Act* (which allows cross-examination of a witness whose testimony is “unfavourable” to the party calling them without the witness been declared hostile), it would be an easier solution for the prosecution to serve the evidence of the witness as unused material and not to call him or her and to leave it to the defence whether they wish to call the witness. See also Chapter 10, n 173 and the discussion in Part 10 of Chapter 10 at [10.10.11]-[10.11.13].

<sup>60</sup> (1984) 80 Cr App R 89 at 92.

<sup>61</sup> This was at least one occasion where the informal “Old Boys Act” approach to disclosure had worked, see the discussion in Part 4 of Chapter 5.

<sup>62</sup> (1984) 80 Cr App R 89 at 92.

<sup>63</sup> If anything his evidence harmed the prosecution case.

<sup>64</sup> (1984) 80 Cr App R 89 at 92.

<sup>65</sup> (1984) 80 Cr App R 89 at 93.

<sup>66</sup> This unwillingness of Roberts’ counsel to call Paul at trial was understandable for tactical reasons. To cross-examine an unreliable and potentially hostile witness such as Paul was one thing, but to have called him (with the

Evans was equally insistent that Paul should not be called. All parties accepted that the trial judge, Drake J, could not have compelled the prosecution to call Paul. Drake J refused either to “invite” the prosecution to call Paul or exercise his own power to call him as a witness or even permit counsel for Roberts to call as witnesses the persons to whom Paul had made the incriminating remarks. These findings were challenged on appeal.

[9.4.3] The Court of Appeal rejected these various complaints. The prosecution had given serious consideration to the issue of not calling Paul and it had been entitled not to call him. May LJ remarked that Paul had been “viewed on every side as a witness who was not credible.”<sup>67</sup> Neither the prosecution nor defence had been prepared to call him. This was not an unusual or exceptional case that would have entitled the judge to call Paul as a witness.<sup>68</sup> The evidence of the persons to whom Paul had spoken, had been rejected properly by Drake J as inadmissible, speculative, legally irrelevant and hearsay.<sup>69</sup>

[9.4.4] *Roberts* not only provides an example of the prosecution declining to call a manifestly unreliable witness, but reinforces the principle that the main decision about calling a witness as part of the prosecution case is one for the prosecutor alone. However, it does beg the question why prosecution counsel, despite his initial reluctance to do so, was willing to call Paul at the trial had both defence counsel been able to agree.<sup>70</sup> *Roberts* is revealing in demonstrating that even where the prosecutor is prepared to adopt a minister of justice role

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consequent restrictions in cross-examination on the party calling him) would have been a perilous exercise that could have backfired on the party calling him.

<sup>67</sup> (1984) 80 Cr App R 89 at 96.

<sup>68</sup> As had been noted by Erle J in *R v Edwards & Ors* (1848) 3 Cox CC 82 at 83. See also *R v Richardson* (1974) 131 CLR 116 at 122 and *R v Cleghorn* [1967] 1 All ER 996. cf *R v Simmonds* (1823) 1 Car & P 84 and *R v Tregear* [1967] 1 All ER 989.

<sup>69</sup> This is a difficult and technical area of the law of evidence that is, thankfully, beyond the scope of this Thesis. See further *R v Blastland* [1986] AC 41.

<sup>70</sup> Prosecution counsel’s gesture in *Roberts* can be compared with the similarly generous gesture of prosecution counsel in *R v Greenwood* [2004] EWCA Crim 1388. In this case at a murder retrial prosecution counsel had been willing (and at the first trial had also made this concession) to make the necessary concession to allow legally inadmissible hearsay material to go before the jury to suggest that two men other than the accused may have committed the murder with which the accused had been charged. However, the judge at the retrial had prevented the introduction of this material on the basis that it was legally irrelevant, peripheral and would have invited speculation. The Court of Appeal disagreed and accepted that the material was relevant and that it had been wrongly rejected. Waller LJ approved of the prosecutor’s concession and commented that a strict application of the hearsay rule could lead to injustice. He noted that the Crown might “commendably” not insist on a strict adherence to the hearsay rule [2004] EWCA Crim 1388 at [38]. There was a “long-standing” practice whereby the Crown might be willing to make certain admissions that “might” point to a third party having committed the crime [2004] EWCA Crim 1388 at [40]. Additionally the prosecutor may come under “some obligation” to make the necessary admissions though “on the whole” the question of what admissions the Crown was prepared to make, or what evidence they should call, should be left to the prosecutor [2004] EWCA Crim 1388 at [41]. Waller LJ stated prosecution counsel had not been obliged to call the two other men at trial but had the defence suspicions proved powerful enough then he or she may have chosen to do so in order to rebut that suspicion. To ask the prosecutor to act in such a manner does seem to be stretching even the role of a minister of justice role too far.

in calling witnesses, there can remain difficult issues of the kind that presented itself in *Roberts*.

[9.4.5] *Grafton* is also notable in addressing the tensions that can confront the prosecutor in his or her choice of witnesses at trial. Grafton had been convicted at trial of unlawful wounding. A man called Gilbert had sustained serious injuries after being violently set upon and attacked by a gang when leaving a public house at closing time. Gilbert was adamant that the attack had been utterly unprovoked. Grafton asserted that he had acted in self-defence after Gilbert had brandished a bottle at him. A man called Everitt, a friend or acquaintance of Grafton, gave a statement to the police claiming to have seen Gilbert brandish a bottle at Grafton. Despite this clear disparity in accounts both Gilbert and Everitt were called by the prosecution at committal. Both adhered to their original accounts. Despite the disparity between them a case to answer still existed and Grafton was committed for trial.

[9.4.6] At trial both Gilbert and Everitt were again called by the prosecution. Both witnesses again adhered to their original accounts. After Everitt’s testimony prosecution counsel decided to abandon the prosecution and indicated to the trial judge, His Honour Judge Stable QC, that he would offer no further evidence. This prompted, what the Court of Appeal later described as:

... an unusually animated argument between counsel and the judge, who was clearly outraged at what he expressly called the crass incompetence of the Crown Prosecution Service in serving and making part of the prosecution case, a witness they knew would support the defendant and then seeking to discontinue when predictably he did just that.<sup>71</sup>

[9.4.7] While Gilbert in the view of Judge Stable was a “witness of truth and a very accurate and careful one,” the testimony of Everitt was dismissed as “patently false.”<sup>72</sup> Judge Stable urged the prosecution to continue with the case and maintained that prosecution counsel was “utterly, utterly wrong to chuck your hand in at this stage.”<sup>73</sup> The prosecutor was unmoved by this robust indication (it does seem to be stretching the word to describe this as a mere “invitation”) and refused to call the remaining witness, a police officer who dealt with the interview with the defendant during which he had accepted his presence at the scene of the fracas. In fact prosecution counsel played no further role in the proceedings and the judge proceeded to call the police officer and the trial continued. The accused was convicted.

[9.4.8] The Court of Appeal had no hesitation in quashing the conviction on appeal. Judge Stable was held to have departed from the familiar and simple truism of a criminal trial in England that in an adversarial process it is for the Crown to present the case for the prosecution and for the defence to present the case for the accused. The role of the trial judge is “to hold the ring impartially.”<sup>74</sup> By calling the last witness himself Judge Stable had

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<sup>71</sup> [1992] 4 All ER 609 at 611. See further Birch, D, “Commentary [to *R v Grafton*]” [1992] Crim LR 828-829.

<sup>72</sup> [1992] 4 All ER 609 at 611.

<sup>73</sup> [1992] 4 All ER 609 at 611.

<sup>74</sup> [1992] 4 All ER 609 at 613.



not only supplemented the prosecution but in effect had taken it over.<sup>75</sup> Though a trial judge has a power to call a witness in a criminal trial it is a power that is to be rarely exercised. The decision of prosecution counsel to abandon the case and not to call the final witness was for the prosecution alone. The judge could express his or her own view and issue an “invitation” to prosecution counsel to reconsider but the final decision remained one for the prosecution alone. However, Lord Taylor CJ considered it necessary to observe that:

We can well understand and sympathise with the judge’s concern that where serious injuries had been inflicted on Mr. Gilbert who gave credible evidence implicating the appellant, the prosecution case should have been prejudiced by inappropriately calling witness who should have been tendered to the defence. It was conceded that this was a mistake, flowing from a desire to be fair to the defence.<sup>76</sup>

[9.4.9] Though Lord Taylor CJ’s language is notably more restrained than that of Judge Stable it is evident that both he and Judge Stable viewed the prosecution as being in error in calling Everitt at the trial. Though this was conceded by the prosecution on appeal,<sup>77</sup> the issue is not, perhaps, so simple. The bald assertion that the prosecution was in error in calling Everitt fails to appreciate the conflicting responsibilities that had been cast upon the prosecution in its choice of witnesses by earlier authorities, notably *Oliva*. Prosecution counsel in *Grafton* evidently wished to be fair to the defence and on an application of *Oliva* Everitt could only have been discounted by the prosecution if it was satisfied that he was a wholly unreliable witness. The fact that Everitt’s account was inconsistent with the prosecution case to be advanced at trial and Gilbert’s account was not enough in itself to render him untruthful or unreliable. Unlike the situation in *Oliva* where the witnesses were plainly unreliable as they had contradicted their earlier accounts,<sup>78</sup> the situation in *Grafton* was less clear cut. The Crown’s decision, applying *Oliva*, to call Everitt is explicable. He may not have been an ideal prosecution witness but that was different to discounting him as an untruthful or unreliable witness. *Grafton*, like *Roberts* and similar cases in Australia,<sup>79</sup> illustrates that the unreliability “get out” clause from *Oliva* is difficult to apply. Its scope remains uncertain because the extent or nature of the unreliability that will activate it is unpredictable. The criticisms of Judge Stable and Lord Taylor CJ may have been better directed at the confusing state of the law arising from *Oliva* as opposed to castigating the prosecution’s decision to call Everitt. This case, it is submitted, demonstrates that there is a fundamental inconsistency between *Woodhead* and *Oliva*.

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<sup>75</sup> [1992] 4 All ER 609 at 613. In other words, “Prosecutors prosecute, and judges judge,” see Birch, above n 72, 828.

<sup>76</sup> [1992] 4 All ER 609 at 613.

<sup>77</sup> There is also the issue that prosecuting counsel in *Grafton* may have been premature to have jettisoned the prosecution case after Everitt’s evidence in light of *R v Brent* [1973] Crim LR 275.

<sup>78</sup> See also *R v Roberts* (1984) 80 Cr App R 89 and *R v Tregear* [1967] 1 All ER 989 for cases where the witnesses were patently unreliable.

<sup>79</sup> Compare, for example, *R v Shaw* (1991) 57 A Crim R 59 and *R v Kneebone* (1999) 47 NSWLR 425 with *R v Kizon & Kizon* (1985) 18 A Crim R 59. See further the earlier discussion in Part 6 of Chapter 8.

[9.4.10] The apparent disparity between *Woodhead* and *Oliva* has not gone unnoticed. For instance, in 1973 in the overlooked case of *R v Brent*<sup>80</sup> the accused was charged with the unlawful taking of a motor vehicle. The issue at trial was one of identification. Brent had raised an alibi and this was supported by two witnesses. These two witnesses were named on the indictment and called by the prosecution at trial. Though it may seem incongruous that the prosecution should call witnesses who undermined its case, such a decision, as in *Grafton*, would seem to have been in accordance with the rule in *Oliva* compelling the prosecution to call any “credible” witness, even if his or her evidence would be inconsistent with the thrust of the prosecution case. Despite the inconsistency between the prosecution witnesses Brent was convicted. On appeal the defence argued that owing to the conflict between those prosecution witnesses who identified Brent as the offender and the others who supported his alibi, the trial judge should have halted the case. They relied on a proposition from a civil case<sup>81</sup> that where two equally credible witnesses called by one side contradict one another, “It was not competent for the persons calling them to pick and choose between them. They could not discredit one and accredit the other.”<sup>82</sup>

[9.4.11] The Court of Appeal disagreed, holding that the proposition advanced by the defence did not apply to criminal trials. The court noted that there was an apparent conflict between *Oliva* and *Woodhead* and that it may well be difficult to reconcile the two decisions. However, it proved, fortuitously, unnecessary to resolve that conflict in the present case. The prosecution had a duty to place the evidence before the court fairly. It was open to the prosecution either to call all the witnesses or, significantly, supply their statements to the defence. In the present case the judge had properly left the whole of the evidence to the jury to consider. This conclusion may be correct but it seems an awkward and impracticable solution for the prosecution to call at trial both the witnesses who help and also those who hinder their case and then for the jury to perform the mental gymnastics necessary to accept the evidence of certain prosecution witnesses and to reject the evidence of others.<sup>83</sup> As with *Roberts* and *Grafton* would it not have been simpler in *Brent* for the prosecutor not to call the two witnesses who supported the defence case and to have left it to the defence to call them? It is preferable, as a commentator on *Brent* observed, that a party should be free to call only those witnesses that support its case and, proceeding on the basis that the other side will call those witnesses they perceive as supporting their cause, then leave it to the jury to decide which of the conflicting witnesses to believe.<sup>84</sup> The other party, in this context the defence, as

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<sup>80</sup> [1973] Crim LR 275.

<sup>81</sup> *Sumner & Livesley v John Brown & Co.* (1909) 25 TLR 745.

<sup>82</sup> *Sumner & Livesley v John Brown & Co.* (1909) 25 TLR 745 per Hamilton J.

<sup>83</sup> See also *Graham v Police* (2001) 122 A Crim R 152 at 165 per Wells J and *R v Goncalves* (1997) 99 A Crim R 193 at 216 per Wheeler J which noted that it was settled in a criminal trial that the prosecution could call witnesses who gave inconsistent accounts of the events in question and could invite the court to prefer the evidence of one prosecution witness to another. See further the discussion in Part 10 of Chapter 10 at [10.10.9].

<sup>84</sup> See MG, above n 44, 276.

had happened in *Nicholson*, would have been aware of the evidence of those witnesses who may have supported their case and were free to call them themselves.<sup>85</sup>

[9.4.12] This solution would have resolved the tensions that arose in both *Roberts*<sup>86</sup> and *Grafton*.<sup>87</sup> In both cases the defence were aware of the identities and evidence of the potential witnesses. In both cases it was open to the defence to call them and it is arguable that it was purely an issue for them, subject to any rules of admissibility, as to how they wished to deal with the potential witness. In neither case was it appropriate to insist or expect the prosecution to call the witness. One might ask whether it is appropriate in an adversarial system for the defence, as in *Roberts*, to seek to retain the tactical advantage of cross-examination and to expect the prosecution to call a witness whom the prosecutor considers in his or her discretion is unhelpful or unnecessary to the prosecution case. In both *Roberts* and *Grafton* a more logical and satisfactory state of affairs may have been produced by applying *Woodhead* and, having furnished their evidence to the defence, left it to the defence to decide on calling witnesses as unhelpful to the prosecution case as Paul and Everitt.<sup>88</sup>

[9.4.13] Despite *Oliva* and the continued ostensible application in England of the prosecutorial role as a minister of justice to calling witnesses, in practice prosecutorial discretion in England has been significantly extended through various decisions and related developments in criminal procedure. The courts in recent years have come very close to embracing the solution and the prosecutorial role as to calling witnesses suggested as long ago as 1936 by Hawke J in *Nicholson* and later by the commentator to *Brent*.

## Part 5: Confusing the Jury: a Wider Prosecutorial Discretion?

[9.5.1] The first case after *Oliva* to suggest an apparent widening in the prosecution's discretion not to call a material witness was *R v Nugent*<sup>89</sup> in 1977.<sup>90</sup> Nugent was charged with robbery and conspiracy to rob arising from the murder of a milkman. Nugent had given two differing accounts to police about his presence at the scene of the crime before asserting that he had an alibi for the relevant time. He had furnished the police with details of eight witnesses who supported his alibi. The police obtained statements from these eight

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<sup>85</sup> See the further discussion at Chapter 10 noting *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437.

<sup>86</sup> In *Roberts* the initial reluctance of prosecution counsel to call Paul was well founded and the prosecutor's offer to call Paul was misconceived, even if out of a desire to be scrupulously fair. Paul was an unreliable and less than prosecution witness on any definition.

<sup>87</sup> Similarly, Everitt was, if not positively unreliable within *Oliva*, a partial and less than ideal prosecution witness. His statement could have been served as unused material on the defence. See *R v Balmforth* [1992] Crim LR 825.

<sup>88</sup> See further the discussion in Part 11 of this Chapter, Part 6 of Chapter 10 and Part 1 of Chapter 11.

<sup>89</sup> [1977] 3 All ER 662.

<sup>90</sup> Though only a decision made at first instance, *Nugent* is still a persuasive decision. As with the unreported but influential decision of Henry J in *R v Saunders* on the law of disclosure, even a first instance decision can prove to be of powerful persuasive authority, see Chapter 5, n 168.

witnesses and they were included by the prosecution in the committal bundle.<sup>91</sup> As the eight witnesses were, obviously, highly unhelpful to his case, prosecution counsel refused to call or tender them at trial at the Central Criminal Court. However, in accordance with the practice in *Woodhead* and *Cassidy* the prosecution ensured that the eight witnesses were present at court and were thus available to be called by the defence. The defence were reluctant to call the witnesses and asked Park J to “invite”<sup>92</sup> the prosecutor to call them or, failing that, call them himself. The defence placed “great reliance”<sup>93</sup> upon *Oliva* and argued that the interests of the accused would be prejudiced if the Crown were not required to call the witnesses. They could not be discounted as unworthy of belief and they had been “named on the back of the indictment” by the prosecution. The defence argument was that as the eight witnesses were capable of belief, “then there is a clear duty on the Crown to call them, even though the evidence they will give will be inconsistent with the case which the Crown set out to prove.”<sup>94</sup>

[9.5.2] Prosecution counsel disagreed. He submitted that he was under no duty to call the alibi witnesses given that their evidence was “wholly inconsistent”<sup>95</sup> with the prosecution case. Any duty upon the prosecution was satisfied by having made the eight witnesses available at court so that the defence could call them if they had wished to do so. The prosecutor relied upon the now familiar path of *Seneviratne*, *El Dabbah*, *Woodhead* and *Cassidy* and asserted that three principles emerged from those cases. First, the prosecution had a discretion as to what witnesses to call to support its case. Second, in the exercise of that discretion, the prosecution should act fairly and not be influenced by any “oblique motive.”<sup>96</sup> Third, the prosecution must have available at court the witnesses whom they had indicated to the defence would be called by the prosecution.<sup>97</sup>

[9.5.3] The trial judge, Park J, was unwilling to accept this approach. His Lordship agreed with Lord Roche’s view in *Seneviratne* that the exercise of the prosecutor’s discretion in the selection of witnesses would depend on the particular circumstances of each case.<sup>98</sup> If in the present case, for instance, the evidence of the eight witnesses had related to events in the vicinity of the scene of the stabbing then *Oliva* would have applied and in the absence of good reason, such witnesses should be called by the prosecution as they would be able to give evidence that would relate “to the unfolding of the narratives on which the prosecution case

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<sup>91</sup> They were therefore taken as named on the back of the indictment.

<sup>92</sup> [1977] 3 All ER 662 at 664.

<sup>93</sup> [1977] 3 All ER 662 at 664.

<sup>94</sup> [1977] 3 All ER 662 at 666.

<sup>95</sup> [1977] 3 All ER 662 at 666.

<sup>96</sup> This expression originates from *El Dabbah v Attorney-General of Palestine* [1944] 2 All ER 139 at 144. See further *R v Wellingborough Justices, ex parte Francois* (1994) 158 JP 813 and (1994) 158 JPN 587.

<sup>97</sup> [1977] 3 All ER 662 at 666. These three principles advanced by prosecution counsel supporting the adversarial role of the prosecutor’s in calling witnesses wholly accords with the historical authorities, see the conclusion at the end of Chapter 7.

<sup>98</sup> *R v Seneviratne* [1936] 3 All ER 36 at 49. See the discussion in Part 7 of Chapter 7.

was based.”<sup>99</sup> However, these witnesses did not fall into this category. Nugent had already given two differing accounts about his movements and the alibi witnesses the defence were seeking to compel the prosecution to call would give yet another account. The result of the prosecution calling the witnesses would be twofold. First, it would “cause confusion in the jury’s mind about the nature of the Crown’s case.”<sup>100</sup> Secondly, it “would be to impose on the Crown the function of both prosecution and defence.”<sup>101</sup> Therefore, Park J held that the prosecution was under no duty to call the eight witnesses and declined to extend any “invitation” for them to do so.

[9.5.4] It is difficult to distil from *Nugent* a single clear and authoritative statement of principle.<sup>102</sup> There are two possible and conflicting interpretations of the *ratio*. One view holds that *Nugent* represents a departure from *Oliva* to the extent that it widens the prosecutor’s entitlement not to call a witness at trial if the prosecutor considers that calling that witness would merely “confuse” the jury at trial about the central issues to be proved.<sup>103</sup> In other words the prosecutor need not call even a credible witness if his or her evidence would “tend to distract the jury from the primary issues in the present case.”<sup>104</sup> The opposing interpretation is that *Nugent* did not create any new law or any extension to the strictly limited entitlement conferred on prosecutors by *Oliva* to refrain from calling a material witness. Rather *Nugent*, as Hiden J in 1995 in *R v Armstrong*<sup>105</sup> explained, was “merely an example of the rule laid down in *Oliva* not being applied for the reason given in *Oliva*, namely, that the evidence of the witnesses was not ‘capable of belief.’”<sup>106</sup> If a witness was credible, even if his or her evidence was inconsistent or unhelpful with the prosecution case, then according to Hiden J there “is a clear duty on the prosecution to either call or tender the witness.”<sup>107</sup>

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<sup>99</sup> *R v Seneviratne* [1936] 3 All ER 36 at 49.

<sup>100</sup> [1977] 3 All ER 662 at 666.

<sup>101</sup> [1977] 3 All ER 662 at 666.

<sup>102</sup> Given that Park J drew upon the confusing case of *R v Seneviratne* [1936] 3 All ER 36 this lack of clarity is unsurprising.

<sup>103</sup> See Birch, above n 37, 826 and Birch, D, “Commentary [to *R v Russell-Jones*]” [1995] Crim LR 834. *Russell-Jones* is an example of the “wider” *Nugent* entitlement not to call a witness who would merely “confuse” the trial. See below n 164.

<sup>104</sup> See also *R v Mason & Ors* [1996] Crim LR 325; (otherwise unreported) Court of Appeal, 15 December 1995, Transcript: John Larking. *Mason* is another example of the “wider” approach. See further in this Chapter at [9.10.8].

<sup>105</sup> [1995] Crim LR 342 (otherwise unreported). Court of Appeal, February 24 1995, No 2047Y5, Transcript: John Larking. See also *R v Balmforth* [1992] Crim LR 825.

<sup>106</sup> *R v Armstrong*, Transcript, 16.

<sup>107</sup> *Ibid*, 18. This was the situation that arose in *Armstrong*. The prosecutor had relied on *Nugent* and refused at trial to adduce the evidence of a girlfriend of the accused that had been included in the committal bundle. The girlfriend’s account of the whereabouts of the accused at the time an armed robbery had been committed was consistent with the accused’s alibi. The girlfriend could not be regarded as incapable of belief. Therefore the Court of Appeal considered that the prosecutor’s reliance on *Nugent* had been “misplaced” (*Ibid*, 18) and that he should have adduced the evidence of the girlfriend. However the proviso was applied and the appeal was dismissed.

[9.5.5] The confusion over the *ratio* in *Nugent* is indicative of the ongoing and longstanding judicial inconsistencies in confronting the vexed issue of the prosecutorial role in calling witnesses. As Birch has noted, there is a clear conflict between the two contrasting interpretations of *Nugent*.<sup>108</sup> However, Birch has suggested that, “The difference between the two formulae may be more apparent than real.”<sup>109</sup> Her view is that the same result would be reached regardless of which view of *Nugent* is preferred. However, it would be wrong in my opinion to treat *Nugent* simply as an application of *Oliva*. Park J applied *Seneviratne* and was influenced in his conclusion by the confusion to the jury that would have resulted from the prosecution being required to call the eight alibi witnesses and perform the functions of both prosecutor and defence. His Lordship was enunciating a wider latitude to the prosecutor to not call a material witness than the very limited entitlement conferred by *Oliva*. This raises the question as to the extent that Park J, sitting at first instance, could depart from *Oliva* given that he was obviously bound by the rule of precedent to follow a decision of the Court of Appeal.<sup>110</sup>

[9.5.6] The status of *Nugent* was considered in 1992 in *R v Balmforth*.<sup>111</sup> The accused had been charged in this case with a serious assault after a fight between two groups of youths. A witness called Stanley had been named on the back of the indictment. Stanley had been involved in the fracas and his statement, though on one point supporting the prosecution case, largely supported the defendant’s version of events. Prosecution counsel accepted that Stanley was capable of belief and initially agreed with defence counsel that he would tender Stanley for cross-examination. However, the prosecutor changed his mind and refused to tender Stanley after the trial judge indicated that the prosecution in his view did have a discretion not to call Stanley. The defence were required to call him. The evidence at trial must have been tenuous because the judge invited the jury at the close of all the evidence to acquit the accused. The jury rebuffed this invitation and the accused was convicted on a majority verdict.

[9.5.7] The Court of Appeal quashed the conviction. The Court of Appeal was of the view that prosecution counsel had not been entitled to rely upon either *Oliva* or *Nugent* in refusing to call or tender Stanley. In relation to the *ratio* of *Nugent*, Staughton LJ observed:

That seems to us merely an example of a case where the prosecution, in the exercise of its discretion, regards a witness or witnesses as incapable of belief or wholly unreliable. It did not overrule, *indeed it could not overrule* [my emphasis], the decision of this court in *Oliva*

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<sup>108</sup> Birch (1995), above n 103, 834.

<sup>109</sup> *Ibid.*

<sup>110</sup> There is a respectable argument that the second portion of Lord Parker’s judgement in *Oliva* when he formulated the “duty” on the prosecutor to call any witness deemed “capable of belief” was decided, if not *per incuriam*, at least in apparent disregard of the powerful *Woodhead* and *El Dabbah* line of authority, and is therefore of questionable persuasive authority. Nevertheless, it would still be a brave judge sitting at first instance who would feel able to disregard the second part of *Oliva*.

<sup>111</sup> [1992] Crim LR 825 (otherwise unreported); Court of Appeal, 12 June 1992, Transcript: Martin Welsh Cherer.

that where the prosecution does regard a witness as capable of belief it must be prepared to call that person as part of the prosecution case.<sup>112</sup>

[9.5.8] Stanley was not a witness who was incapable of belief. As he had been named on the back of the indictment Staughton LJ concluded that the prosecution had been under a duty to either call him or tender him for cross-examination. The defence had been wrongly compelled to call Stanley and thus deprived of the ability to cross-examine him, especially on the point where he supported the Crown case.<sup>113</sup>

[9.5.9] I would argue that *Nugent* does widen the prosecution's discretion not to call a material witness. Though the authorities following *Nugent* are inconclusive on this issue, it is significant that even a decision such as *Balmforth* that appears at first glance to subscribe to the minister of justice role of the prosecution in calling witnesses, suggests a solution to this issue that would have the practical effect of widening the prosecution's discretion in its selection of witnesses.

### **Part 6: The Solution as to what to do with the Material but Unwanted Witness?**

[9.6.1] In her commentary to the later decision of *R v Russell-Jones*, Birch suggests that an obvious solution to the dilemma that had presented itself to prosecution counsel in a case like *Balmforth* would be that if there were witnesses who were unhelpful to the prosecution case or that the prosecution otherwise did not wish to call, then such witnesses simply should not be included by the prosecution in the committal bundle.<sup>114</sup> Such witnesses would not be named on the back of the indictment and the prosecution would be free to choose not to call them. Their statements would constitute unused material. Birch indicated that this course of action could even be adopted in relation to a credible witness.<sup>115</sup> Birch's suggestion finds support in *Balmforth* itself. In discussing the prosecutor's discretion to call witnesses Staughton LJ commented:

That is a wide discretion and one which prosecution counsel is entitled to exercise. But once he has formed the view that the witness is capable of belief, then as the Lord Chief Justice said,<sup>116</sup> the prosecution must call the witness, even though the evidence he is going to give is inconsistent with the case sought to be proved. It is suggested that any such doctrine would cause inconvenience. *If that be so, the remedy may be not to include in committal papers*

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<sup>112</sup> Transcript, 6.

<sup>113</sup> The Court of Appeal was also influenced by the trial judge's doubts about the strength of the prosecution case.

<sup>114</sup> See Birch, above n 103, 834.

<sup>115</sup> *Ibid.*

<sup>116</sup> This is a reference to the comments of Lord Parker CJ in *R v Oliva* [1965] 3 All ER 116 at 122.

*witnesses who are inconsistent with the prosecution case and whom the prosecution would not wish to call* [my emphasis].<sup>117</sup>

[9.6.2] This suggestion was adopted by the Court of Appeal in the following year in *R v Richardson*.<sup>118</sup> The accused had been convicted following a retrial of the murder of a prostitute in Brighton in 1986. The Crown had advanced a “formidable case”<sup>119</sup> against Richardson based on detailed confessions he had made and circumstantial evidence that included the defendant’s movements on the fatal day. The prosecution case was that the victim had been murdered before 4 pm on the afternoon of 7 February. However, some witnesses claimed to have seen the deceased while still alive at a nightclub in Brighton that night. Other witnesses disagreed. All this material had been served as unused material on the defence prior to the first trial.<sup>120</sup> At the retrial defence counsel, Mr. Martin-Sperry, was keen for the prosecutor to call or tender the witnesses who described seeing the deceased at the nightclub on the night of 7 February. The prosecutor refused to do so. The trial judge chose not to intervene and declined to either “require” or “invite” the prosecutor to call the witnesses.<sup>121</sup> The defence called the witnesses.

[9.6.3] On appeal the defence contended that the trial judge had erred and that he “ought to have invited the Crown to call the witnesses and the Crown ought to have done so in any event.”<sup>122</sup> The Court of Appeal disagreed. Lord Taylor CJ compared the present appeal with the “confusion” that would have arisen in the jury’s mind in *Nugent* had the prosecutor been compelled in that case to have called the eight alibi witnesses. The Lord Chief Justice observed:

In the present case a similar situation had developed. It had throughout been the Crown’s case that the deceased was killed on the afternoon of Friday 7 February. At the second trial the appellant sought to run a defence which was contrary to his confessions and contrary to the instructions he had given at his first trial. Against that background Mr. Martin-Sperry sought to force the prosecution to call evidence inconsistent with their own case and supportive of the defence case. Furthermore, unlike the evidence in *Oliva* or *Nugent* the witnesses in question had never been part of the prosecution case. Their statements had been served on the defence as unused material. That is precisely the course which was recommended in the case of *Balmforth*...In all the circumstances, we consider the learned

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<sup>117</sup> *R v Balmforth*, Transcript, 7. This passage was quoted with approval by Lord Taylor CJ in *R v Richardson* (1994) 98 Cr App R 174 at 177.

<sup>118</sup> (1994) 98 Cr App R 174.

<sup>119</sup> (1994) 98 Cr App R 174 at 175.

<sup>120</sup> This material was not raised by the defence at the first trial as Richardson’s instructions then were that he had been present at the premises of the deceased on the afternoon of 7 February with a man called “Pete” in the course of a robbery and Pete had gone beyond the course of the joint enterprise and had killed the deceased.

<sup>121</sup> (1994) 98 Cr App R 174 at 176

<sup>122</sup> (1994) 98 Cr App R 174 at 177. Mr. Martin-Sperry in argument had conceded the trial judge had no power to oblige the prosecution to call the witnesses and the judge had not been obliged to call the witnesses himself.



judge was right not to accede to the application. To have pressed the Crown to call the witnesses would in effect have required them to act as both prosecution and defence.<sup>123</sup>

[9.6.4] Lord Taylor CJ noted that the witnesses in question had been called by the defence at the retrial and that defence counsel had been in “some difficulty”<sup>124</sup> during argument at the Court of Appeal when asked to explain what more he could have hoped to have secured from the witnesses through cross-examination than in the examination of them. The appeal was dismissed.

[9.6.5] *Richardson* is an important decision. There was no suggestion that the witnesses who claimed to have seen the deceased at the nightclub on the night of 7 February were incapable of belief. Those witnesses may have been mistaken<sup>125</sup> but they could not be dismissed as incredible. Though it is debatable whether their evidence was “essential to the unfolding of the narratives on which the prosecution” was based,<sup>126</sup> their evidence could not be discounted as peripheral or immaterial as the prosecution case was that the deceased had been murdered in the afternoon. On an application of the minister of justice role and the duty stated in *Oliva* prosecution counsel in *Richardson* would have been expected to call or tender the witnesses who claimed to have seen the deceased at the nightclub. However, the Court of Appeal, adopting the suggestion in *Balmforth*, recognised that through the simple device of not including those witnesses in the “committal bundle” and serving their statements as unused material, the prosecutor was properly entitled to decline to call them. As Kennedy LJ later observed in *R v Clarke and Hewins*,<sup>127</sup> when delivering the judgment of the Court of Appeal, *Richardson* made it:

...clear that where, as in this case, a witness statement has simply been served on the defence as unused material, the prosecution is not under any duty to call the maker of the statement as a witness and, provided that the decision is made *bona fide*, the prosecution is free to consign a witness to that category even though he purports to have been present at the scene and to have made material observations. The power of a trial judge to call a witness himself can only be exercised in exceptional circumstances...<sup>128</sup>

[9.6.6] Accordingly in *Clarke and Hewins* the court applied *Richardson* and held that the prosecution had been entitled not to call at trial a material witness called Pembridge about the events preceding a fatal fire for which the defendants were allegedly responsible.<sup>129</sup> Though Pembridge had consumed drugs on the night in question and the prosecution had

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<sup>123</sup> (1994) 98 Cr App R 174 at 177-178.

<sup>124</sup> (1994) 98 Cr App R 174 at 178.

<sup>125</sup> In fact they must have been mistaken as the jury’s verdict at the retrial indicates their evidence was rejected.

<sup>126</sup> This expression is derived from Lord Roche’s comments in *R v Seneviratne* [1936] 3 All ER 36 at 49.

<sup>127</sup> Unreported, Court of Appeal, 15 February 1999, No 97/4822/W3, Transcript: Smith Bernal.

<sup>128</sup> Transcript, at [7].

<sup>129</sup> The trial judge had refused to either call Pembridge himself or to stay the proceedings until the prosecution called him. Though these decisions were upheld on appeal the appeal was ultimately allowed on other grounds.

reasons to question the reliability of his recollection of the events,<sup>130</sup> the court based its decision, not on any suggestion that Pembridge was unworthy of belief or wholly unreliable, but on the simple fact that his statement had been served as unused material on the defence and if any defendant wanted to call him they were free to do so.<sup>131</sup> Kennedy LJ accepted, as quoted above, that the prosecution did not enjoy a completely unfettered discretion in its choice of witnesses. They were still required to act in a *bona fide* manner. This indication is reminiscent of Lord Thankerton’s suggestion in *El Dabbah* that a court would only interfere with the prosecution’s wide discretion in its choice of witnesses if it could be shown that they had been influenced by some “oblique motive.”<sup>132</sup> No elaboration was provided by either Lord Thankerton or Kennedy LJ about what circumstances might entitle the court to interfere in the prosecution’s choice of witnesses. The question of what constituted an “oblique motive” remained to be defined.<sup>133</sup>

## Part 7: An Oblique Motive

[9.7.1] Some indication of what might constitute an “oblique motive” was provided in 1994 by the Divisional Court in *R v Wellingborough Justices, ex parte Francois*.<sup>134</sup> In this case the accused had been charged with threatening behaviour and criminal damage. The case was listed for an all day summary trial. The prosecutor opened her case by saying a total of five witnesses would be called, including two whom the defence had requested to be in attendance. All five witnesses were at court. At 12.40 pm after three witnesses had completed their evidence the prosecutor abruptly and without warning closed her case and stated that she would not be calling the remaining two witnesses as she had to be in another court that afternoon. The prosecutor also explained that the two remaining witnesses “did not take the prosecution case any further.”<sup>135</sup> The defence advocate objected to this presumptuous course of action and asked the prosecutor to at least tender for cross-examination the two witnesses and, failing that, for the Magistrates to call the witnesses themselves. The Magistrates refused to intervene and said that it was for the prosecutor to decide what witnesses to call. The accused was convicted and the defence challenged the conviction in the Divisional Court.

[9.7.2] The Divisional Court stated that the prosecutor should have at least tendered the two witnesses for cross-examination. The prosecutor’s decision concerning calling or tendering for cross-examination a witness at trial had to be exercised in such a manner as was

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<sup>130</sup> Pembridge had been with the defendants on the night in question to brew “magic mushrooms.”

<sup>131</sup> Transcript, at [7]. Though both defence counsel were free to call Pembridge, they were reluctant to do so as some of his evidence was unhelpful to the two defendants.

<sup>132</sup> [1944] 2 All ER 139 at 144.

<sup>133</sup> See further the discussion in Part 5 of Chapter 10.

<sup>134</sup> (1994) 158 JP 813. The decision is also reported in a condensed form at (1994) 158 JPN 587.

<sup>135</sup> (1994) 158 JP 813 at 815. The prosecutor prepared an affidavit for the Divisional Court asserting her belief that the two remaining witnesses were unnecessary to her case and did not add anything further to the earlier witnesses.

calculated to further the interests of justice while at the same time being fair to the defence.<sup>136</sup> McGowan LJ stated that he could not approve of the conduct of the prosecutor and that the “only likely explanation” for the prosecutor’s “strange behaviour” was the fact that she had another case in the afternoon to attend to and had felt under pressure to finish the present case.<sup>137</sup> McGowan LJ remarked that, “However much personal sympathy one might feel for her in her dilemma, that was not a factor which could properly be allowed to influence her handling of the first case.”<sup>138</sup>

[9.7.3] McGowan LJ reviewed the familiar cases of *Oliva*, *Seneviratne* and *El Dabbah* and noted the reference by Lord Thankerton to the possibility of a prosecutor being swayed by some “oblique motive” in his or her choice of witnesses. McGowan LJ considered that the conduct of the present prosecutor had been prompted by the presence of such an “oblique motive,” namely “by being in a hurry to finish the case and go to another case.” McGowan LJ concluded this “oblique motive was her real reason, and that it was an improper exercise of her discretion.”<sup>139</sup>

[9.7.4] McGowan LJ disagreed with the prosecutor’s assertion that the two witnesses were immaterial to the case. Not only were they relevant but one had been “essential to the unfolding of the narrative.”<sup>140</sup> It was wrong that the defence had been denied the opportunity of cross-examining them. There could have been relevant issues for the defence to have put. The Magistrates could have “invited” the prosecutor to tender the two witnesses and, in the “unlikely event” of her ignoring such an invitation, the Magistrates could have called them themselves.<sup>141</sup> Accordingly the conviction was quashed and the case remitted to the Magistrates for rehearing.

[9.7.5] *Wellingborough Justices* provides a rare example of a court being satisfied that a prosecutor’s choice of witnesses had been swayed through an “oblique motive,” therefore entitling the court to intervene.<sup>142</sup> The court gave a wide definition to the notion of an “oblique motive.” There was no suggestion that the prosecutor in that case had acted out of malice or bad faith and it is telling that the court did not insist on the presence of such

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<sup>136</sup> (1994) 158 JPN 587.

<sup>137</sup> (1994) 158 JP 813 at 815.

<sup>138</sup> (1994) 158 JP 813 at 815.

<sup>139</sup> (1994) 158 JP 813 at 817.

<sup>140</sup> (1994) 158 JP 813 at 817.

<sup>141</sup> (1994) 158 JP 813 at 818.

<sup>142</sup> Editor, “Prosecution should have tendered its evidence” (1994) 158 JPN 459. *Wellingborough* is briefly discussed and defended in this article. The decision of the Divisional Court is understandable for, as in *R v Sterk* [1973] Crim LR 275, the prosecutor had probably passed the point of “no return” when she had opened her case by including reference to the evidence of the two witnesses. However, I would question the imputation of an “oblique motive” to the prosecutor by McGowan LJ. The prosecutor may have acted ill-advisedly and hastily but the predicament that she found herself in was hardly unique and many lawyers would have similar experiences of finding themselves “double booked.” Was it not harsh to categorise her action as acting from an “oblique motive?”

misconduct by the prosecutor as a pre-requisite for its intervention.<sup>143</sup> *El Dabbah* and *Wellingborough Justices* raise the question of what amounts an “oblique motive” and whether such a test affords a suitable guide for the exercise of the prosecution’s discretion in its choice of witnesses or whether there should be some other test governing the prosecutor’s discretion in this area.

[9.7.6] This issue was considered by the Divisional Court in *Wilkinson v Crown Prosecution Service*.<sup>144</sup> Though this case dealt with a defence challenge to the prosecutor’s refusal to adduce all the evidence of the alleged victim at the preliminary hearing,<sup>145</sup> it is relevant in the present context in shedding light on the test to be applied by the court in considering the prosecution’s exercise of its discretion in relation to witnesses as the court’s comments appear of general application.

[9.7.7] Both members of the court, Lord Bingham CJ and Cresswell J, accepted that the prosecution had to act, as always, “fairly.”<sup>146</sup> But the prosecution had a broad discretion as to how it chose to present its case at committal. However, this broad discretion was subject to one significant qualification. Lord Bingham observed that in deciding what evidence to adduce the prosecutor was required neither to mislead the court nor take unfair advantage of a defendant.<sup>147</sup> The court retained a limited power to intervene. Lord Bingham explained:

Mr. Gledhill for the appellant submits that this court has power to intervene and control proceedings in the magistrates’ court if abuse of the court’s process is shown. Mr. Marshall [counsel for the prosecution] accepts that that is so, and so do I. It is plain from authority that the court will not shut its eyes to abusive, oppressive or manipulative behaviour of a prosecutor which makes it unfair for a defendant to be tried at all. But that is a very difficult test to satisfy, and the court will not intervene in the absence of compelling evidence to show such improper behaviour has taken place.<sup>148</sup>

[9.7.8] Cresswell J commented to similar effect:

There is, of course, a clear duty on the prosecutor, whether at trial or in the course of committal proceedings not to mislead the court. It is possible to envisage circumstances

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<sup>143</sup> A similar definition of an “oblique motive” was also expressed in *R v Russell-Jones* [1995] 3 All ER 239 at 244.

<sup>144</sup> (1998) 162 JP 591.

<sup>145</sup> Whether in the form of traditional committal proceedings (whether oral or “on paper”), the service of a notice of transfer by the prosecution in a complex fraud or in a sexual or violent offence involving a child witness or victim or an indictable only offence being “sent” direct at first appearance to the Crown Court under s 51 of the *Crime and Disorder Act* 1997 and the prosecution’s evidence later being served. The prosecution’s modern role in calling witnesses at committal and the extent of its discretion at this stage is beyond the scope of this Thesis. There is a divergence of opinion on this issue between England and Australia. The English authorities support an “adversarial” role at committal that confers on the prosecution a broad degree of discretion. In contrast in Australia the balance of authority supports a minister of justice role at committal, similar to that which now exists at trial, see further the references cited at Chapter 8, n 58.

<sup>146</sup> (1998) 162 JP 591 at 599-600. This broad contention was not disputed by prosecution counsel.

<sup>147</sup> (1998) 162 JP 591 at 600.

<sup>148</sup> (1998) 162 JP 591 at 599.

where the conduct of the prosecution in criminal proceedings might arguably be open to challenge on the grounds of abuse of process: for example, if the prosecution tendered a statement from (call him A) but declined to tender a further statement from A, which withdrew what A had said in his first (and only) statement tendered to the court.<sup>149</sup>

[9.7.9] It is significant that the Divisional Court insisted that the test to be applied in determining whether the court would interfere with the prosecutor's choice of witnesses is not whether an "oblique motive" could be shown but rather whether an "abuse of process" existed.<sup>150</sup> The application of this test in preference to Lord Thankerton's reference to an "oblique motive" accords with the position that has been adopted in Canada.<sup>151</sup> This question will be considered in greater length in Chapter 10,<sup>152</sup> but it is arguable that the general notion of an "abuse of process" is familiar to practitioners with experience of the criminal law in England<sup>153</sup> and Australia<sup>154</sup> and provides a clearer test than "oblique motive" or if the prosecutor has acted outside his or her "overall duty of fairness as a minister of justice."<sup>155</sup>

## Part 8: Attempts to Achieve Clarity and Consistency in the Law

[9.8.1] The Court of Appeal was presented in October 1994 in *R v Russell-Jones*<sup>156</sup> with the opportunity to bring some overdue clarity and consistency to this area of the law.<sup>157</sup> The accused had been convicted at a retrial at Cardiff Crown Court of arson and attempted deception. At the original trial a police officer called Parsons had been named on the indictment and had given evidence. His testimony had been considered to be credible in some respects by the prosecution but unreliable in other respects.<sup>158</sup> In particular, Parsons'

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<sup>149</sup> (1998) 162 JP 591 at 601.

<sup>150</sup> It will be noted that the test stated in *Wilkinson* is similar to the passing comments made by Roch LJ in *R v Taylor* as to when the court might consider it proper to interfere with the prosecutor's selection of witnesses.

<sup>151</sup> See, for example, *R v Davydov* (1992) 13 CR (4<sup>th</sup>) 67 and *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437.

<sup>152</sup> See the discussion in Part 5 of Chapter 10.

<sup>153</sup> Defence abuse of process submissions have persisted unabated in England over recent years in relation to issues of disclosure and unused material despite the repeated admonishments uttered in cases such as *R v Childs*, *The Times*, 30 November 2002. See further the discussion in Part 9 of Chapter 6.

<sup>154</sup> See Fox, R, "Criminal Delay as Abuse of Process" (1990) 10 Mon U L Rev 64 at 78-79, Hunter, J, "Abuse of Process Savages Issue Estoppel" (1995) 18 UNSW LJ 151 at 165-166 and Hunter *et al*, Ch 4 n 19, 1267-1269 at [24.56]-[24.59].

<sup>155</sup> The imprecise test suggested by Kennedy LJ in *R v Russell-Jones* [1995] 3 All ER 239 at 244.

<sup>156</sup> [1995] 3 All ER 239.

<sup>157</sup> Whether the court succeeded in this objective is debatable.

<sup>158</sup> See *R v Cairns, Zaidi and Chaudhary* [2003] 1 Cr App R 38 and [2003] Crim LR 403. Such a witness according to John Smith is quaintly known as the "Curate's Egg Witness" in that their evidence is like the notorious Curate's Egg; "Good only in parts," see Smith, J, "Commentary [to *R v Cairns*]" [2003] Crim LR 403 at 405. It is not unusual for the prosecution (or any party in legal proceedings) to call a witness whose evidence may be helpful in one respect but unhelpful in another. It may be possible to rely on the helpful part and not to rely on the unhelpful part. After all, as Smith observes, "Most people tell lies sometimes but no-one lies all the time" (*Ibid*). There is no rule preventing the prosecution from calling or relying on the evidence of such a witness. It is open to the jury with caution to accept part

claim that the accused had smelt of petrol was “almost certainly wrong.”<sup>159</sup> The defence had suggested in their cross-examination of Parsons that he had only included this inaccurate claim at the instigation of the investigating police officers. This inference supported the defence case that the investigating officers had been, as the defence described it, “improving” the evidence against the accused and that the police had “manufactured the evidence to inculpate him.”<sup>160</sup> The defence had been keen for the prosecution to call or tender Parsons at the retrial so that they could again pursue this theme in cross-examination. The prosecution viewed Parsons as an unsatisfactory witness and refused to call him at the retrial. The defence were not prepared to call him.<sup>161</sup> A defence submission that the prosecutor was obliged to call or tender Parsons was rejected.

[9.8.2] The prosecution’s refusal to call or tender Parsons was upheld on appeal. Kennedy LJ, delivering the Court of Appeal’s judgment, accepted that Parsons was unreliable about a major portion of his testimony and held that the prosecutor had a discretion not to call a witness named on the indictment, even if part of the evidence of that witness was capable of belief. That discretion according to Kennedy LJ had to be exercised “in a manner calculated to further the interests of justice, and at the same time to be fair to the defence.”<sup>162</sup> The present case was comparable to *Nugent*. Kennedy LJ observed that had the prosecutor been compelled to call Parsons, “the jury would be confused as to what really was the prosecution case.”<sup>163</sup> The defence only wished Parsons to be called so that they could impugn the police investigation. They could still have pursued this theme through cross-examination of the investigating officers: they knew about Parsons’ evidence and could call him if they had wished. Kennedy LJ concluded:

Prosecuting counsel was entitled, in those circumstances, to conclude that the calling of the police officer or the tendering of him as a witness would not further the interests of justice and it was not necessary for him to be tendered in fairness to the defence...Prosecuting counsel was entitled to exercise his discretion as he did.<sup>164</sup>

[9.8.3] In reaching this conclusion Kennedy LJ took the opportunity to enunciate a comprehensive series of propositions that were designed to provide an authoritative

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of the evidence of a witness and to reject another part. In *Cairns* the prosecution were entitled to call, and the jury to act upon, a witness who incriminated Zaidi and Chaudhary but not Cairns.

<sup>159</sup> [1995] 3 All ER 239 at 242 per Kennedy LJ. This apparently incriminating claim could not have been true on the prosecution case as presented at trial as to the circumstances and timing of the alleged offence.

<sup>160</sup> [1995] 3 All ER 239 at 241.

<sup>161</sup> Parsons was available at the retrial to give evidence and was even spoken to by the defence solicitor but defence counsel chose not to call him.

<sup>162</sup> [1995] 3 All ER 239 at 243.

<sup>163</sup> [1995] 3 All ER 239 at 245.

<sup>164</sup> [1995] 3 All ER 239 at 245. It will be noted that Kennedy LJ was influenced by *Nugent* in reaching this conclusion and *Russell-Jones* can be regarded as an application of the wider interpretation of *Nugent*; the prosecutor being entitled not to call a significant witness named on the indictment if that evidence would merely serve to “confuse” the trial.

statement of the law in England concerning the prosecutorial duty in calling witnesses.<sup>165</sup> After referring both to the leading “historical” and the “modern” authorities on this issue, Kennedy LJ stated that from the authorities and rules of practice the following principles appeared to emerge:

1. The prosecution must ordinarily have at court all the witnesses named on the back of the indictment<sup>166</sup> if the defence wished such witnesses to attend. In deciding what witnesses to name on the indictment the prosecutor has an “unfettered discretion,”<sup>167</sup> but the statement of any witness not relied upon by the prosecution should be normally served as unused material on the defence.
2. The prosecution has a discretion whether to call or tender any witness named on the indictment but that discretion is not unfettered.
3. This discretion has to be exercised fairly and in the interests of justice to promote a fair trial. Kennedy LJ accepted that this formulation provided little practical assistance but elaborated that Lord Thankerton’s statement that a court would only interfere with the prosecutor’s discretion if an “oblique motive” could be shown is not to be accorded a restricted definition. It does not mean that the court would only interfere if the prosecutor acted out of malice. It means that the prosecutor must direct his or her mind to his or her “overall duty of fairness, as a minister of justice.” If he or she failed to act in that role then he or she would be motivated “by a consideration not relevant to his [or her] proper task – in that sense an oblique motive.”<sup>168</sup>
4. The prosecutor should ordinarily call or offer to call at trial “all the witnesses who can give direct evidence of the primary facts of the case.”<sup>169</sup> The jury should have available all of the material evidence as to what happened, even if there are inconsistencies between one witness and another. The defence could not always be expected to call witnesses of the primary facts whom the prosecution had discarded. It could be that such a witness while inconsistent with other

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<sup>165</sup> *Russell-Jones* can be compared with the decision of the High Court in *R v Apostilides* (1984) 154 CLR 563 where the High Court provided a similar comprehensive statement of law of Australia on this issue. See further the discussion in Part 4 of Chapter 8 at [8.4.11].

<sup>166</sup> In modern terms this meant any witness whose statements had been served as part of the prosecution case. This includes both those witnesses relied upon at committal and those served post-committal as additional prosecution evidence. See also *R v Mason & Ors*, Transcript, at [12].

<sup>167</sup> [1995] 3 All ER 239 at 243.

<sup>168</sup> [1995] 3 All ER 239 at 244. This wide definition as to what amounts to an “oblique motive” accords with the view taken in *R v Wellinborough Justices, ex parte Francois* (1994) 158 JP 813. See further the discussion in Part 5 of Chapter 10.

<sup>169</sup> [1995] 3 All ER 239 at 244. According to Kennedy LJ it is this limitation on the prosecution’s discretion which requires them to call such central witnesses that explains what is meant by the second part of Lord Roche’s speech in *Seneviratne* (see Chapter 7 at [7.7.5]) and Lord Hewart’s comment in *R v Harris* [1927] 2 KB 587 (see Chapter 7 at [7.5.6]) and, presumably by implication, the other historical minister of justice cases in this area.

prosecution witnesses would be detrimental to the defence case. The prosecutor is entitled not to call a witness who gives evidence of the primary facts if there is some “good reason” for the prosecutor to be able to dismiss the evidence of such a witness as “incredible” or unworthy or incapable of belief.<sup>170</sup>

5. It is for the prosecutor to decide what witnesses could give direct evidence of the primary facts of the case. The prosecutor could discount a marginal or peripheral witness.
6. The prosecutor is also the “primary judge” of whether a material witness could be dismissed as incapable of belief. However, this is subject to the important qualification that the prosecutor could not “properly condemn a witness as incredible” merely because the account of that witness is at variance with that of a larger number of prosecution witnesses or is less favourable to the prosecution case than that of other witnesses.<sup>171</sup>
7. There are limits to the expectations upon prosecutors in the calling of witnesses. While the prosecutor had to be generous, he or she need not be quixotically generous. The prosecution is not obliged “to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies.”<sup>172</sup> Kennedy LJ accepted that any other view, “would in truth, be to assert that the prosecution are obliged to call a witness for no other purpose than to assist the defence in its endeavour to destroy the Crown’s own case. No sensible rule of justice could require such a stance to be taken.”<sup>173</sup>

[9.8.4] These propositions did not represent an exhaustive statement of the law. Kennedy LJ noted that they “should not be regarded as a lexicon or rule book to cover all cases in which a prosecutor is called upon to exercise this discretion.”<sup>174</sup> There could well be special circumstances and it had to be always borne in mind that the primary judgment in calling witnesses rests with the prosecutor and the court would “only interfere if he has gone wrong in principle.”<sup>175</sup>

[9.8.5] Despite this qualification it is clear that *Russell-Jones* is an important decision concerning the prosecutor’s role in calling witnesses. Not only does *Russell-Jones* appear to favour the “wider” interpretation of *Nugent*,<sup>176</sup> but the seven propositions stated by Kennedy

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<sup>170</sup> [1995] 3 All ER 239 at 244.

<sup>171</sup> [1995] 3 All ER 239 at 244. On this point *Russell-Jones* accords with *Oliva*.

<sup>172</sup> [1995] 3 All ER 239 at 244.

<sup>173</sup> [1995] 3 All ER 239 at 244. This passage was applied in *R v Idaewer* [2005] EWCA Crim 2995 at [43]. Such a course of action might well prove unfair to the witness as well as the prosecution.

<sup>174</sup> [1995] 3 All ER 239 at 244.

<sup>175</sup> [1995] 3 All ER 239 at 244-245.

<sup>176</sup> See *Birch*, above n 103, 833.



LJ represent an apparently comprehensive statement of the law in this area. However, close scrutiny of *Russell-Jones* reveals, that as with earlier decisions like *Seneviratne* and *Oliva*, there are still contradictions and inconsistencies in the law that the judgment of Kennedy LJ leaves frustratingly unresolved. Accordingly, like earlier cases, *Russell-Jones* ultimately fails to resolve the prosecutorial role in calling witnesses.

[9.8.6] It would appear from Kennedy LJ's reference to the previous cases and rules of practice that the seven propositions he expressed were a conscious effort by him to condense and reconcile the various and often divergent views expressed in the past authorities in order to arrive at a single and authoritative statement of principle of the prosecutor's proper role in the calling of witnesses. Given that the previous cases are both confusing and inconsistent this is by no means an easy task. The previous cases reflect the longstanding tensions between the prosecutorial roles of a minister of justice and an adversarial advocate in this area. That tension remains in the seven propositions advanced. These propositions represent an uneasy, and not entirely consistent, combination of both the minister of justice and adversarial roles of the prosecutor. While certain of the propositions stress the minister of justice role of the prosecutor in calling witnesses (namely 3, 4 and 6) the others reflect the adversarial character of that role (namely 1, 5 and 7). The propositions and their underlying themes are not entirely consistent. On the one hand, Kennedy LJ notes that the prosecutor enjoys an "unfettered" discretion in deciding what witnesses to name on the indictment and that the prosecutor should be the "primary judge" of what witnesses to call or not to call. He further accepts that it is irrational to insist the prosecution call witnesses simply to enable the defence to undermine the prosecution case. However, on the other hand the fourth and sixth propositions then require the prosecutor to call any seemingly credible or plausible witnesses to the central events, even if their evidence is inconsistent with that of other prosecution witnesses and it is wrong to expect the defence to call such witnesses. Kennedy LJ further suggests that it may even be wrong to expect the defence to call a witness who has been discarded by the prosecution and whose statement has been served as unused material.<sup>177</sup> It is questionable whether the contrasting roles of the prosecutor as a minister of justice and as an adversarial advocate in the calling of witnesses raised in *Russell-Jones* are ultimately capable of reconciliation.<sup>178</sup>

[9.8.7] However, despite such apparent inconsistencies and tensions *Russell-Jones* has proved to be an influential decision. The seven propositions in *Russell-Jones* were described by the Privy Council in 2005 in *State v Grant* as providing "authoritative guidance"<sup>179</sup> in this area of the law. It is no coincidence that these propositions essentially form the present guidance to members of the CPS as to how they should approach their choice of witnesses at

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<sup>177</sup> This is the solution originally suggested in *R v Nicholson* (1936) 100 JPN 553 and later advanced in *R v Balmforth* [1992] Crim LR 825 and adopted in *R v Richardson* (1994) 98 Cr App R 174 at 177-178.

<sup>178</sup> For instance Kennedy LJ makes no mention of the inconsistency between *R v Woodhead* (1847) 2 Car & Kir 520 and *R v Oliva* [1965] 3 All ER 117.

<sup>179</sup> [2007] 1 AC 1 at 17. See also Keane, A, *The Modern Law of Evidence* (7<sup>th</sup> ed) (Oxford, Oxford University Press, 2008) p 143-144.

trial.<sup>180</sup> *Russell-Jones* has been applied in various jurisdictions,<sup>181</sup> and was extended by the Divisional Court in July 1995 in *R v Haringey Justices, ex parte DPP*<sup>182</sup> to govern the calling of witnesses at summary trials.

## Part 9: The Position in Summary Trials

[9.9.1] *Haringey Justices* considered the prosecutorial role in calling witnesses at summary trial. During the trial of two black men who had been charged with summary offences arising from a fracas with two police officers called Hine and Hannah<sup>183</sup> the prosecutor refused to call Hine. Hine had been suspended following an unrelated allegation of misconduct involving theft of money<sup>184</sup> and in accordance with the then CPS policy he was viewed as a dispensable witness.<sup>185</sup> The prosecutor intended to rely on Hannah and indicated that Hine would be made available to the defence if they wished to call him and that the trial could be adjourned for this purpose.

[9.9.2] The defence objected to this proposal and insisted that Hine should either be called or tendered by the prosecutor. They contended that it was unfair of the prosecution not to do so. At first glance this seems an odd, if not mischievous, stance for the defence to have adopted. One would have assumed that the defence case would be assisted by the absence of one of the two main prosecution witnesses. However, this was one of the “exceptional” cases alluded to by Stuart-Smith LJ<sup>186</sup> where the defence were keen for a witness apparently unhelpful to their case to be available for cross-examination.<sup>187</sup> As Stuart-Smith LJ explained:

Rightly or wrongly, the defence considered that they would have a better prospect of establishing their case, which was that the two police officers were out to harass and assault two young black men, if they could cross-examine both officers and no doubt try to exploit the discrepancies between them to show the evidence was fabricated.<sup>188</sup>

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<sup>180</sup> See “The Selection of Prosecution Witnesses” at the CPS website viewed on 16 January 2006, available at: [http://www.cps.uk/legal/section16/chapter\\_b.html](http://www.cps.uk/legal/section16/chapter_b.html). Though, as will be discussed in Part 11 of this Chapter, the extent to which these principles are always followed in practice by prosecutors in England is another issue.

<sup>181</sup> See, for example, *Attorney General v Knowles* [2002] JLR Note 38 (Jersey); *R v Kneebone* (1999) 47 NSWLR 450 (Australia) and *R v White* [2007] NICC 29 (Northern Ireland).

<sup>182</sup> [1996] 1 All ER 828.

<sup>183</sup> Though six other police officers had become involved Hine and Hannah were the main witnesses.

<sup>184</sup> As was made clear by the Divisional Court this was a mere unproven allegation and until proven or admitted it could not detract from the credit of the witness [1996] 1 All ER 828 at 835.

<sup>185</sup> This policy was that if there was enough evidence to proceed without the testimony of a suspended police officer then it was preferable to not rely on that officer at trial.

<sup>186</sup> See the discussion in Part 1 of Chapter 7 at [7.1.12]–[7.1.13].

<sup>187</sup> [1996] 1 All ER 828 at 832. See also Sprack’s previously quoted comments in Chapter 7 at [7.1.13].

<sup>188</sup> [1996] 1 All ER 828 at 832.

[9.9.3] The Magistrates agreed with the defence position and “invited” the prosecutor either to call or tender Hine. The prosecutor declined to do so and the Magistrates thereupon stayed the proceedings as an “abuse of process.” The prosecution sought judicial review of that decision.

[9.9.4] Stuart-Smith LJ, delivering the court’s judgment, applied *Russell-Jones*.<sup>189</sup> His Lordship observed that the bulk of the authorities that had considered the prosecutorial role in calling witnesses had done so in the context of a trial on indictment and not in the context of a summary trial.<sup>190</sup> However, Stuart-Smith LJ considered that, in principle, the prosecutorial duty in calling witnesses in trials on indictment should equally apply to the prosecution’s calling of witnesses in summary trials.<sup>191</sup> However, the practical content of the prosecutor’s duty in a summary case was different to that which existed in trial on indictment owing to the differing procedures in the two courts.<sup>192</sup> The prosecution’s discretion in its choice of

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<sup>189</sup> The Divisional Court quoted in its entirety, and with apparent approval, the seven propositions “conveniently and succinctly summarised” by Kennedy LJ [1996] 1 All ER 828 at 831.

<sup>190</sup> Despite the importance of the summary courts in the administration of the criminal law it is striking how often the summary courts have been neglected and law and practices have been designed for the benefit of trials on indictment, see Darbyshire, Chapter 1, n 27, 627-643.

<sup>191</sup> cf *Ninness v Walker* (1998) 143 FLR 239 at 244.

<sup>192</sup> For a trial on indictment there is a clear procedure in England, whether at committal or subsequently, by means of a notice of additional evidence, for the prosecution to formally serve the evidence of the witnesses they intend to rely upon at trial (any such witnesses would, to use the old expression, be named on the back of the indictment). There exists no obvious equivalent procedure in a summary case. Stuart-Smith LJ noted that while the prosecution is required in England for offences triable “either way” (that is an offence that can be tried either summarily or on indictment before a judge and jury) to provide advance information of its case to the defence (either in the form of a summary of the prosecution case or copies of the statements of the witnesses that the prosecution intends to rely upon (see Rule 4 of the *Magistrates’ Courts (Advance Information) Rules* 1985 (now Rule 21 of the *Criminal Procedure Rules* 2010) there exists no similar requirement of disclosure for an offence triable only summarily, although Stuart-Smith LJ noted that “in practice it is frequently given voluntarily” [1996] 1 All ER 828 at 833, see also [57] of the *Attorney-General’s Guidelines on Disclosure* 2005. Stuart-Smith LJ accepted that “no solution is ideal” in seeking to apply the principles from trials on indictment to summary trials [1996] 1 All ER 828 at 833. Where the prosecution choose to provide copies of the statements of its witnesses as advance disclosure in an either-way offence to the defence that step is equivalent to naming those witnesses on the back of the indictment in a case for trial on indictment and the prosecutor is then expected to call any such witness at the summary trial of an either way offence. If, however, the prosecutor only provides a case summary in an either way offence that is tried summarily or the offence is triable only summarily, then the prosecutor retains an unfettered discretion in determining the witnesses to be called until the actual start of the summary trial when the prosecutor outlines the evidence to be given. The advance information stage may be a neat and distinct point at which to require the prosecution to nail its “colours to the mast” and decide the witnesses to be called at a summary trial of an either way offence. However, Stuart-Smith LJ’s view overlooks the fact that in practice advance information is provided at a suspect’s first court appearance, a mere day or two after charge when the police investigation may be incomplete and when there has not been an opportunity to review or give meaningful consideration to the hypothetical question about what witnesses the prosecution would call in the event of a summary trial for an either way offence. It is unrealistic and premature to expect such decisions to be made at the advance information stage. If Stuart-Smith LJ’s test was to be strictly applied it could lead to prosecutors becoming unduly cautious. Niblett expresses the fear that Stuart-Smith LJ’s view could discourage candour and that prosecutors might either serve incomplete advance information or rely on a summary for fear of later being compelled to call at any summary trial any witness whose statement had been served initially as advance information, see Niblett Ch 5, n 43, 40.

witnesses at trial, whether summary or on indictment, was summarised by Stuart-Smith LJ in the following terms:

...the prosecution have an unfettered discretion as to what witnesses to call. They must decide how to prove their case; they should not call unnecessary witnesses. For example, there may be a large number of witnesses of some major disaster from whom a selection should be made. There may be special reasons why they do not wish to call even an important witness, for example because of the extreme youth of a complainant and the likely adverse consequences or because the witness is too frightened and refuses to give evidence. The prosecution must, of course, disclose the existence of the witness and the fact they are proposing not to call him or her; and in many cases this is done by sending a copy of the witness’s statement to the defence. Then the defence can call the witness if they wish.<sup>193</sup>

[9.9.5] The prosecution in the present case according to Stuart-Smith LJ possessed an “unfettered discretion” whether to call Hine.<sup>194</sup> However, His Lordship pronounced that he was unable to agree with the prosecutor’s refusal to call Hine as his evidence was not merely peripheral or marginal or corroborated by numerous other witnesses. Rather Hine was a vital witness. He was the effective complainant and on any basis was central to the incident which gave rise to the charge.<sup>195</sup> Despite having been suspended for alleged dishonesty, this allegation was unproven and was wholly unrelated to the present case. Hine remained a credible and reliable witness to the central events of the present case.<sup>196</sup> Stuart-Smith LJ disagreed with the CPS policy that discouraged the calling of such a police witness at trial.<sup>197</sup> Though technically the defence could have called Hine if they had wished, Stuart-Smith LJ considered that it was both “unrealistic” and “not in the interests of justice” to compel the defence to call a police officer as a defence witness.<sup>198</sup> The prosecution should call a police officer. In the present case the prosecution should have called Hine, and not merely tendered him for cross-examination.<sup>199</sup> Had the witness the prosecutor was reluctant to call not been a police officer then the situation may have been different and each case then would “have to be considered in the light of its own facts.”<sup>200</sup>

[9.9.6] As Hine was both a credible and central witness this was one of the “exceptional” cases where the Magistrates could properly have “invited” the prosecutor to call or tender

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<sup>193</sup> [1996] 1 All ER 828 at 832. See further the discussion in Part 3 of Chapter 10 at [10.3.8]-[10.3.9].

<sup>194</sup> As the charges were triable summarily and the prosecutor had not commenced his opening address.

<sup>195</sup> [1996] 1 All ER 828 at 835.

<sup>196</sup> Had Hine’s alleged wrongdoing been closely related to the case itself a different view might have been taken.

<sup>197</sup> The CPS policy was changed following this case to reflect Stuart-Smith LJ’s view.

<sup>198</sup> [1996] 1 All ER 828 at 833. See generally the discussion in Part 9 of Chapter 10.

<sup>199</sup> *Haringey Justices* should be contrasted with *Russell-Jones* where the Court of Appeal upheld the prosecutor’s refusal to call the police witness and suggested that the defence could have called him. The two cases can, perhaps, be reconciled in that in *Russell-Jones* the police witness could be dismissed as incredible in relation to much of his evidence, while a similar criticism could not be made of PC Hine in *Haringey Justices*.

<sup>200</sup> [1996] 1 All ER 828 at 833.

Hine.<sup>201</sup> It was “unfair” to the defence and not in the interests of justice for the prosecution not to do so. Stuart-Smith LJ concluded that there had existed no “sufficient grounds not to call him, either as part of the prosecution case or after the Magistrates had ruled that he was a necessary witness.”<sup>202</sup> However, the Magistrates had acted prematurely in purporting to stay the proceedings as an abuse of process when the prosecutor had declined their “invitation” to call Hine. That was a power that should always be employed very sparingly and where there was no other option open.<sup>203</sup> In preference to staying the case, this was one of the rare cases where the Magistrates could have resorted to their own power to call Hine.<sup>204</sup> The decision to stay the proceedings was therefore quashed (though it was not remitted for rehearing).

[9.9.7] *Haringey Justices* is a significant decision. The suggestion that the general principles governing the calling of witnesses by the prosecutor at trial on indictment should apply equally to a summary trial accords with common sense. As discussed previously in relation to prosecution disclosure of unused material,<sup>205</sup> it would be unsatisfactory if there were some lesser or different procedure governing summary trials as opposed to trial on indictment.<sup>206</sup> But the real significance of *Haringey Justices* lies in the rare but practical guidance provided by Stuart-Smith LJ about the scope of the prosecutor’s discretion in calling witnesses. While a police witness should, on essentially policy grounds, be called by the prosecutor, in other circumstances the prosecutor would be entitled to decline to call a material, or even crucial, witness. As Stuart-Smith LJ observes the fear or youth of a potential witness may justify the decision not to call him or her at trial.<sup>207</sup> His Lordship considered that the answer to any grievance that the defence may have could be met through the service to the defence of the evidence of the unused witness so that the defence would be in a position to call the witness if they wished. This is the suggestion proposed by Birch and *Balmforth* and adopted by the court in both *Richardson* and *Clarke and Hewins*, that I would suggest is appropriate in reconciling both the minister of justice and adversarial roles of the prosecutor and the linked issues of disclosure and calling witnesses. The prosecution’s expanded modern duty of disclosure and the pre-trial case management procedures that are now routine in England provide the accused with the knowledge and the opportunity to prepare his or her defence and decide in good time in advance of trial which witnesses to call.

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<sup>201</sup> [1996] 1 All ER 828 at 834.

<sup>202</sup> [1996] 1 All ER 828 at 835.

<sup>203</sup> This admonishment, as previously noted in the context of disclosure, has frequently gone unheeded in England, see *Butterfield*, Ch 5, n 159, 273 at [12.83]. See further Part 10 of Chapter 6 at [6.10.7].

<sup>204</sup> See further the discussion in Part 9 of Chapter 10, especially n 178.

<sup>205</sup> See *R v Bromley Magistrates’ Court, ex parte Smith* [1994] 4 All ER 146. See also Chapter 5, n 198.

<sup>206</sup> Though there may be doubts as to the practicality of the suggestion by Stuart-Smith LJ that the initial advance disclosure of the prosecution case should be compared with the provision of the “committal bundle” and the naming of a witness on the indictment in a case to be tried on indictment.

<sup>207</sup> This guidance is relevant in a modern context in the prosecution of offences such as domestic violence and where the prosecutor must now pay regard to the welfare and views of victims and witnesses, see Chapter 7, n 193.

## Part 10: Towards an Adversarial Role: Does *Oliva* Still Apply?

[9.10.1] Though *Oliva* has not been formally overruled in England, it is apparent that the prosecutor’s strict “minister of justice” duty in calling witnesses as pronounced in *Oliva* has been steadily eroded. The balance of the post-*Oliva* decisions upon close scrutiny have extended the prosecutor’s discretion in the calling of witnesses to the point where it now appears unobjectionable for the prosecution to discharge its duty in respect of an inconvenient or unhelpful witness by discarding that witness and, having served the evidence of that witness on the defence, leaving it to the defence to call that witness.

[9.10.2] The continued status of *Oliva* was questioned in *R v Taylor*<sup>208</sup> in 1995.<sup>209</sup> The accused in this case had been convicted of an armed robbery. His accomplice, a man called Stanton, had given evidence for the prosecution of the commission of the robbery and his planning of the robbery with the accused in the several days leading up to the crime. The mother, daughter and girlfriend of the accused had all made statements contradicting Stanton and asserting that the accused had been with them at the time of the robbery. The daughter’s account also contradicted Stanton’s account of the association between him and the accused in the days leading up to the robbery. These three witnesses had been included in the committal bundle and were named on the indictment. The defence relied on *Oliva* and contended that the prosecution was bound to call the three witnesses, asserting that they were not incredible. The trial judge, Judge Mettyear, disagreed and refused to “direct” the prosecution to either call or tender the witnesses.

[9.10.3] Judge Mettyear’s reasoning was noteworthy. His Honour drew attention to the procedural changes that had occurred since *Oliva* had been decided in 1965 when all cases had to be committed by means of an “old style” hearing at which all the Crown witnesses had to give “live” evidence.<sup>210</sup> Indictments were drafted then by prosecution counsel and counsel was responsible for listing on the back of the indictment the witnesses whom the

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<sup>208</sup> *The Times*, 11 December 1995 (otherwise unreported); Court of Appeal, 23 November 1995, No 95/0640/Y3, Transcript.

<sup>209</sup> Though for different reasons to that raised in Parts 1 and 2 of this Chapter.

<sup>210</sup> A detailed account of the fundamental changes to the committal procedure brought about by the *Criminal Justice Act 1967* (and by various subsequent statutes) is beyond the scope of this Thesis. Suffice to say that before the 1967 Act the procedure employed for the conduct of a committal hearing in England had not changed for over a century. It was time-consuming and, to modern eyes, remarkably laborious. Every witness, whether their evidence was contested or not and whether the defendant even contested his or her guilt, had to give “live” evidence at committal and a deposition was taken verbatim of their account. It was this deposition, rather than any statement or account that they had originally given to the police or prosecutor, which formed their evidence. One can see that any prosecutor might have been tempted for reasons of practical and administrative convenience, if nothing else, to refrain from calling a material, or even, important, witness at the committal stage and to keep their case as simple as possible. This temptation would still have remained, albeit to a lesser extent, when the 1967 Act abolished the mandatory “old style” committal hearing in England and the insistence upon all the witnesses attending to give “live” evidence. Though the 1967 Act allowed a “paper” committal without consideration of the evidence in certain circumstances it still preserved the right of the defence (and, less commonly in practice, the prosecution) to insist on some or all of the prosecution witnesses giving “live” evidence at committal in the form of a deposition.

prosecution intended to call at trial.<sup>211</sup> The judge observed that the “bundling” of the witness statements and the selection of witnesses at trial was now performed by a lawyer employed by the CPS. His Honour had little faith in the ability of the CPS to perform this task and noted that the CPS lawyer was likely to have insufficient time to give all cases the attention that they deserved. This resulted “frequently” in statements being included at committal of witnesses the prosecution did not wish to call at trial.<sup>212</sup> Judge Mettyear, as summarised by the Court of Appeal, observed:

... he had no enthusiasm for the principles set out in *Oliva*. It seemed to him that it was outdated and the realities of modern criminal practice is that mistaken inclusions in bundles are bound to continue. That was the one of the realities of life.<sup>213</sup>

[9.10.4] Given Judge Mettyear’s apparent frankness it is unsurprising that the defence, despite the judge’s later acceptance that he was bound to follow *Oliva*, contended on appeal that the judge had only paid “lip service” to *Oliva* and that His Honour had “not been loyal to the spirit of the decision.”<sup>214</sup> They argued that the prosecutor should have been required to call the three witnesses.

[9.10.5] The Court of Appeal avoided any consideration of whether *Oliva* was now “outdated.”<sup>215</sup> Roch LJ simply considered that *Oliva* did not apply to the present case and that Lord Roche’s speech in *Seneviratne* did. Roch LJ commented that the prosecutor did have a discretion in calling the three witnesses. There was no suggestion that the prosecution had either brought their case maliciously or that they did not honestly believe that the accused had been involved in the armed robbery.<sup>216</sup> “It had to follow from that in the prosecution’s view any witness who said the appellant was elsewhere at the time of the robbery was not telling the truth.”<sup>217</sup> The three witnesses were also closely linked to the accused. In such circumstances Roch LJ concluded:

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<sup>211</sup> *R v Taylor*, Transcript, 11.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*, 12. Judge Mettyear’s unflattering assessment of the performance of the CPS is not without foundation. A regular complaint about the CPS at the time was the excessive emphasis placed by them on routine summary cases and their neglect of the preparation and prosecution of cases at the Crown Court. Legally unqualified staff were often given responsibility for the preparation of a case for committal and the selection of prosecution witnesses. This theme was highlighted in a critical review of the CPS in 1997 which recommended a major shift in focus to the Crown Court, see Glidewell, I, *The Review of the Crown Prosecution Service: A Report* (London, HMSO, 1998) Ch 8. It is ironic that the prosecution’s inclusion in England of unhelpful witnesses may have been due to administrative incompetence as opposed to adherence to any minister of justice role in calling witnesses.

<sup>214</sup> *R v Taylor*, Transcript, 12.

<sup>215</sup> This reluctance to consider the authority of *Oliva* is similar to that expressed in *R v Brent* [1973] Crim LR 275.

<sup>216</sup> The Court of Appeal here appears to be taking a narrower view of what would amount to an “oblique motive” than was taken in either *Russell-Jones* or *Wellingborough Justices*. Roch LJ seems to be indicating that the court would only interfere with the prosecution’s choice of witnesses if it was acting out of malice or bad faith.

<sup>217</sup> *R v Taylor*, Transcript, 15.

In our judgment the prosecution were clearly entitled to exercise their discretion not to call these three witnesses, for these reasons: the witnesses did not give direct evidence of the primary facts of the case; they were not essential for the unfolding of the narrative on which the prosecution was based, and the prosecution had grounds for regarding their evidence as unworthy of belief. To call them would have been to proffer them merely to give the defence material with which to attack the credit of the witnesses on whom the prosecution relied. The prosecution are not obliged to call witnesses for no purpose other than to assist the defence in its endeavour to destroy the prosecution’s own case. Such a course merely serves to confuse the jury. The Crown’s obligation is to make such witnesses available to the defence so that the defence can call them if they choose to do so. The evidence is then led by the party who wishes to rely upon it and can be tested by cross-examination. To do otherwise would mean that the jury would have had evidence which conflicted with the Crown’s case, which had not been tested in cross-examination. Trials must be fair to both the defence and the prosecution and for the jury who are sworn to arrive at a true verdict.<sup>218</sup>

[9.10.6] This statement of principle even extended to the evidence of the defendant’s daughter that contradicted Stanton’s account of his association with the defendant in the days leading up to the robbery. Even if she was credible on this point, as the defence insisted, Roch LJ noted that the prosecution were still entitled to refuse to call her. The daughter’s evidence “did not directly relate to the primary facts of the case.”<sup>219</sup> Judge Mettyear had acted correctly in not “directing” the prosecutor to call the three witnesses.<sup>220</sup> In fact His Honour had “exercised his discretion in the only sensible way in the light of the circumstances of this case”<sup>221</sup> that he could have.

[9.10.7] It is arguable that the persuasive value of *Taylor* is diminished by the fact that no reference was made by Roch LJ in the course of his judgment to the important case of *Russell-Jones*, although that decision had been cited by the defence. Nevertheless, *Taylor* must be regarded as an explicit rejection of the prosecutor’s role purely as a minister of justice in the calling of witnesses. Roch LJ emphasised that there are limits on the fetters to be imposed on the prosecution in its choice of witnesses and that a certain degree of discretion was necessary in the performance of this function. The Court of Appeal leaned distinctly, albeit not quite as far as cases such as *Woodhead* and *El Dabbah*, towards recognition of the adversarial nature of the prosecutorial role in this area.

[9.10.8] A similar theme emerges from the decision of the Court of Appeal, only four days after the decision in *Taylor*, in the case of *R v Mason and Others*.<sup>222</sup> The prosecution had

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<sup>218</sup> *Ibid*, 15-16.

<sup>219</sup> *Ibid*, 17. See also *R v Litchfield* [1998] Crim LR 508 where the court adopted a similar narrow view of witnesses able to “give direct evidence of the primary facts of the case.” The court “unhesitatingly” rejected the “impossible” defence argument that expert evidence fell within this expression. The prosecution had been entitled to decline to call one of its expert witnesses whose report was equivocal with the prosecution case. *Taylor* and *Litchfield* should be contrasted with the expansive view of Callinan J on this point in *R v Dyers* (2002) 210 CLR 285 at 326-327. See Part 8 of Chapter 8 at [8.8.3].

<sup>220</sup> Roch LJ accepted that the prosecutor was entitled to reject any “direction” to call a witness, see Transcript, 17.

<sup>221</sup> *Ibid*.

<sup>222</sup> [1996] Crim LR 325 (otherwise unreported); Court of Appeal, 15 December 1995, Transcript: John Larking.



refused at the trial for murder of three defendants to call a witness who was named on the indictment.<sup>223</sup> Counsel for one of the three accused had wished to use the witness to attack the credibility of an important prosecution witness. The witness was neither irrelevant nor wholly unreliable.<sup>224</sup> However, the prosecution, in the view of the Court of Appeal, had been entitled on the basis of the “wider” interpretation of *Nugent* not to call the witness to avoid “confusing” the jury. The witness could not give direct evidence about the primary facts of the case. His evidence would have introduced inadmissible material and would have tended to distract the jury from the central issues in the case. In addition the Court of Appeal was untroubled by the contention of defence counsel that the prosecutor is obliged to call or tender any generally credible witness named on the back of the indictment if the defence ask for him or her to be called. Though this proposition accords with *Oliva*,<sup>225</sup> on this occasion it fell on deaf ears. Kennedy LJ noted:

We disagree. The earlier authorities to which we were referred were all considered by this Court in the case of *Russell-Jones* where it was made clear that the prime consideration in the exercise of this discretion is that it must be exercised in the interests of justice so as to promote a fair trial.<sup>226</sup>

[9.10.9] Whist the notion that the prosecution discretion in its choice of witnesses has to be exercised in a manner to promote a fair trial is unobjectionable,<sup>227</sup> Kennedy LJ’s guidance offers little practical assistance to prosecutors in this area. Given that trials have to be fair, as Roch LJ commented in *Taylor* to not only the defence but also the prosecution and the jury,<sup>228</sup> it is possible to interpret Kennedy LJ’s formulation in *Mason* as supporting either of the prosecutorial roles in calling witnesses.<sup>229</sup>

[9.10.10] The Court of Appeal again considered the prosecutorial role in its choice of witnesses at trial in 1996 in *R v Brown and Brown*.<sup>230</sup> In this case the two defendants had been convicted in respect of a fracas at a nightclub during which a “bouncer” had been kicked by both defendants and had sustained unpleasant injuries.<sup>231</sup> The prosecution case was assessed by the Court of Appeal as “overwhelming.”<sup>232</sup> A friend of the two defendants called McCormack had been present at the fracas and was named on the back of the

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<sup>223</sup> The witness’s evidence was served post-committal. This was held to be tantamount to the witness being named on the back of the indictment, see Transcript at [12].

<sup>224</sup> It was noted that part of the evidence of the witness was judged by the prosecution to be capable of belief, see *Ibid*.

<sup>225</sup> And also cases such as *R v Armstrong* [1995] Crim LR 342.

<sup>226</sup> *R v Mason*, Transcript at [12].

<sup>227</sup> The interests of fairness extend beyond the accused, see further the discussion in Part 7 of Chapter 4 at [4.7.2].

<sup>228</sup> One could add to this that trials also have to be fair to the community and the victim and witnesses, see *Attorney-General’s Reference (No 3 of 1999)* [2001] 2 AC 91 at 118. See also the discussion in Part 7 of Chapter 4 at [4.7.3].

<sup>229</sup> In this context *Mason* has distinct echoes of *Russell-Jones*.

<sup>230</sup> [1997] 1 Cr App R 112.

<sup>231</sup> The unfortunate victim had sadly lost one of his testicles as a result of the attack.

<sup>232</sup> [1997] 1 Cr App R 112 at 121.

indictment. McCormack accepted that he had been “quite drunk” but insisted that he “did not see anyone kick anyone.”<sup>233</sup> This claim was inconsistent with the accounts of all the other prosecution witnesses. Prosecution counsel regarded McCormack as “unreliable” and refused to call or tender him at trial. This was even after the trial judge had extended an “invitation” to the prosecutor to do so. The defence, despite having taken their own statement from McCormack, also chose not to call him.

[9.10.11] Neither the trial judge nor the Court of Appeal was prepared to over-rule the prosecution’s refusal to call McCormack. The Court of Appeal gave only brief, almost passing, consideration to this issue and did not insist on the prosecution demonstrating that they had been clearly entitled to discount McCormack as a witness unworthy or incapable of belief. There was no demand that the prosecutor establish unreliability in the same strict sense required in earlier cases like *Oliva*, *Armstrong* and *Russell-Jones*.<sup>234</sup> In fact, the Court of Appeal appears to have adopted a relatively flexible view as to what would amount to the unreliability of a witness to such as to entitle the prosecutor to decline to call him or her, even if he or she was named on the back of the indictment and had seen the primary events.<sup>235</sup> As the Court of Appeal later said in *R v James*,<sup>236</sup> a court would be reluctant to interfere with the prosecutor’s broad discretion in this area.

[9.10.12] The further significance of *Brown* lies in Schiemann LJ’s discussion of the scope of the prosecutor’s role in calling witnesses and the modern ramifications of that role. His Lordship’s view was there was little purpose in the citation or consideration of “cases decided long ago” owing to the major changes that the criminal justice system had undergone in England since those times.<sup>237</sup> Schiemann LJ outlined seven general propositions that governed the prosecutor’s role in calling witnesses at trial.<sup>238</sup> Though he

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<sup>233</sup> [1997] 1 Cr App R 112 at 117.

<sup>234</sup> Those cases had suggested that that the prosecution would have to show “good reason” to be able to “properly regard” a witness as incapable of belief and the mere fact that the witness was unhelpful to the prosecution case or was inconsistent with the evidence of the other prosecution witnesses did not mean the prosecutor was entitled to discard that witness as incredible or incapable of belief.

<sup>235</sup> A similar flexible view seems to have been taken in *R v Mulkerins & Sansom*, unreported, Court of Appeal, 20 June 1997, No 95/7501/Y4 & No 95/7424/Y4, Transcript. The two accused had been convicted of the importation of cocaine. At issue was the timing of the taking of certain photographs showing drugs being loaded into a van. The prosecution refused to call a customs officer called Wiggins at the trial who was named on the back of the indictment. Wiggins contradicted the prosecution case on this point. Prosecution counsel maintained that Wiggins was “simply mistaken as to the time at which the photographs had been taken” and he was not credible on this issue, Transcript, at [8]. There was no suggestion that Wiggins was unworthy of belief or untruthful. The defence felt compelled to call Wiggins and he proved a damaging witness for the defence case. The trial judge refused to interfere. The prosecutor’s refusal to call Wiggins was upheld by the Court of Appeal. Kennedy LJ felt that the decision not to call Wiggins “was entirely in accordance with the principles set out by this court in *Russell-Jones*, and in our judgment cannot be faulted,” *Ibid*, at [8]. *Mulkerins* should be contrasted with the position in Australia where a stricter test has been applied of the circumstances in which the prosecution is entitled not to call a material witness because of his or her purported unreliability, see the discussion in Part 6 of Chapter 8.

<sup>236</sup> [2000] EWCA Crim 1119 at [47].

<sup>237</sup> [1997] 1 Cr App R 112 at 113. See further the discussion in Part 12 of Chapter 7 at [7.12.4].

<sup>238</sup> [1997] 1 Cr App R 112 at 113-114.

did not attribute these propositions to *Russell-Jones*, it is apparent that the seven principles outlined are similar to those stated by Kennedy LJ in *Russell-Jones*.<sup>239</sup> It is therefore unnecessary to repeat them here even though they differ in minor respects to the principles set down in *Russell-Jones*.<sup>240</sup>

[9.10.13] However, Schiemann LJ offered a crucial qualification to the seven general propositions. Whatever may have been the past position, having regard to the modern criminal procedure he considered that the plea and directions hearing<sup>241</sup> “nowadays [is] the primary time when a decision should be made as to whether the Crown should call a witness, who to a greater or lesser degree, may give evidence favourable to the defence”<sup>242</sup>

[9.10.14] Schiemann LJ’s identification of the plea and directions hearing as the appropriate stage for the prosecution to settle its choice of witnesses accords with both common sense and practice. It is unlikely that the prosecution trial advocate, especially in England, would have considered the prosecution case at committal or transfer with a view to selecting the witnesses to be called at trial. Difficult or problematic decisions about disclosure or what witnesses to call at trial that may be integral to the conduct or course of the trial are appropriately left to the trial advocate to make post-committal.<sup>243</sup> Such decisions can have a fundamental bearing on the course and outcome of the trial and there will be circumstances in which it is prudent and preferable that such a decision is reserved to the trial advocate. As is noted by Schiemann LJ, the pre-trial interlocutory hearing is designed to promote the effective conduct and management of the trial.<sup>244</sup> It provides the ideal forum and opportunity for decisions to be made by the prosecution about its choice of witnesses at trial.<sup>245</sup> The existence of such a hearing also enables the defence to be notified well in advance of the trial

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<sup>239</sup> *Russell-Jones* was cited and referred to in *Brown*. It would seem to be stretching judicial coincidence that Schiemann LJ would state seven propositions so similar to the seven principles outlined in *Russell-Jones*.

<sup>240</sup> Schiemann LJ, for example, emphasised that the prosecution has a discretion about what witnesses to rely upon for the purposes of establishing a *prima facie* case for either committal or transfer. The law in England on this issue diverges from that in Australia, see Chapter 8, n 58. In dealing with the expectation of the prosecution to call the witnesses concerning the “primary facts of the case,” Schiemann LJ indicated that while the prosecution need not call witnesses who were inconsistent or contrary to its case it should call witnesses whose “evidence does not fit in exactly with the case he is seeking to prove” [1997] 1 Cr App R 112 at 114. Presumably McCormack fitted into the former, as opposed to the later, category.

<sup>241</sup> Whether it is also called a “directions hearing” or a “case management and directions hearing” or something else.

<sup>242</sup> [1997] 1 Cr App R 112 at 113.

<sup>243</sup> The comments of Auld LJ in *R v Bow Street Magistrates’ Court, ex parte Finch* [1999] EWHC Admin 527 at [28] support such a proposition.

<sup>244</sup> See Auld, Ch 2, n 333, Ch 10 at [204]. See further Part 10 of this Chapter.

<sup>245</sup> Whether or not such pre-trial hearings meet their stated purpose is a different proposition. It is still not uncommon for important tactical decisions relating to the conduct of the trial (including even “plea bargains”) to be made, literally, at the doors of court on the day of trial see, for example, Auld, Ch 2, n 333, at [10.35]-[10.36]; National Audit Office, *Criminal Justice: Working Together* (London, National Audit Office, 1999) p 103-107; Weatherburn, D, and Baker, J, “Delays in Trial Case Processing: an Empirical Analysis of Delay in the NSW District Criminal Court” (2000) 10 *Jour Jud Admin* 6-24 and Payne, J, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Canberra, AIC, 2007).

of the prosecution’s intentions in calling witnesses and provides them with ample opportunity to consider and call any witness discarded by the prosecution.<sup>246</sup>

[9.10.15] The service of the prosecution’s evidence at committal and the naming of a witness on the back of the indictment in Schiemann LJ’s view is merely an “indication that the Crown, at that stage, wish to rely on those witnesses.”<sup>247</sup> His Lordship considered that the prosecution is not compelled to call such witnesses and right up to the start of trial retains the power to change its mind and decline to call a witness named on the back of the indictment.<sup>248</sup> Circumstances may change by the time of the plea and directions hearing or the trial so that the prosecution may no longer wish to rely on a witness who had been named on the indictment. In this regard Schiemann LJ nominated the following examples:

1. New evidence, such as DNA or fingerprints, may become available which would make it unnecessary to call witnesses who had an unsatisfactory view of the central events.
2. Better and clearer witnesses may come forward after committal which may make it unnecessary to rely on a more marginal witness; “who previously was the best available.”<sup>249</sup>
3. The prosecution may receive new information as to the credibility of a witness that leads them to reassess his or her reliability or creditworthiness.
4. The prosecution trial advocate may take a different view of the desirability of calling as a witness of truth a witness named on the back of the indictment than that taken when the prosecution case was prepared for committal.<sup>250</sup>

[9.10.16] *Brown* is a vital decision in this area of the law. Though the seven propositions stated by Schiemann LJ are at first glance consistent with those enunciated in *Russell-Jones* a close scrutiny of *Brown* reveals that it does enhance substantially the discretion of the prosecutor in his or her choice of witnesses at trial. This discretion is widened both in terms of who can or cannot be called at trial and when such a decision can be made. The previous notion that reliance by the prosecutor at committal or subsequently on the evidence of a witness and the naming of that witness on the indictment was tantamount to the prosecution “nailing its colours to the mast” was heavily qualified. *Brown* allows the prosecution right up to the start of the trial to change its mind about the witnesses to call and so further extends the prosecutor’s discretion about who it will call. *Brown* represents a continuation of shift back towards the line taken in the historical cases that placed emphasis on the adversarial

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<sup>246</sup> See Birch, above n 34, 660. See further the discussion in Part 10 of this Chapter.

<sup>247</sup> [1997] 1 Cr App R 112 at 114-115.

<sup>248</sup> Schiemann LJ noted that both the judge and the prosecutor should be astute to avoid any unfairness that could result to an accused from a “late minute change of mind” by the prosecutor to not call a witness [1997] 1 Cr App R 112 at 115.

<sup>249</sup> [1997] 1 Cr App R 112 at 115.

<sup>250</sup> This was the point made by Judge Mettyear in *Taylor*. It can be better to leave such decisions to the trial advocate.

nature of the prosecutorial role. *Brown* is a significant step towards the prosecutor's adversarial role and is a retreat from the minister of justice role and the duty outlined in *Oliva* in calling witnesses.<sup>251</sup>

[9.10.17] The decision of *R v Bradish and Hall*<sup>252</sup> in 2004 provides further illustration of the shift towards an adversarial prosecution role. In this case the two accused had been convicted of conspiracy to rob and linked offences arising from an elaborate series of armed robberies. There had been two trials. At the first trial a man called Roberts had pleaded guilty to certain offences and had given evidence for the prosecution. Bradish's defence was that Roberts was the real culprit and that he had "deliberately and wrongly" put Bradish "into the picture in place of his fellow real conspirators."<sup>253</sup> Bradish's counsel asserted that Roberts was a material witness and could give evidence about the conspiracy and insisted that Roberts be called at the second trial. The prosecutor and the trial judge disagreed and both refused to call Roberts.

[9.10.18] The Court of Appeal agreed with both these decisions. Kay LJ referred to both *Haringey Justices* and *Brown*. His Lordship considered that it was pertinent to ask why the defence had wanted Roberts to be called. "The clear answer" to that question was "that they wanted to put the defence case to the witness and in that way to have his case presented to the jury."<sup>254</sup> Bradish had no intention of giving evidence in support of his defence. Kay LJ was critical of this motivation:

...they wanted to place the matter before the jury by way of cross-examination... they wanted the questions asked in cross-examination to have an impact upon the jury. That was, we conclude, an improper device and it is not the purpose of cross-examination to act as a

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<sup>251</sup> See also in this context *R v Jenkins*, unreported, Court of Appeal, 21 December 1999, No 98/4720/W3, Transcript: Smith Bernal. The accused in that case had been convicted of the brutal murder of his foster daughter. His two natural daughters, L aged 10 and A aged 12, had been in the immediate vicinity at the relevant time. Their initial accounts to the police had been exculpatory of their father. Their subsequent accounts differed and the girls by this time were hostile to their father (this was after discussion with the police and their mother). The prosecution did not call either A or L at trial. Prosecution counsel explained in so far as the girls had initially supported the defence case they were "not credible," "not because the girls were dishonest but because they were simply wrong or confused" (Transcript, at [95]). Their accounts were served as unused material. The trial judge on this ground refused to "invite" the prosecution to call A and L but also considered that the prosecution had acted properly in its discretion in not calling them. On appeal the defence argued that the girls' evidence was "crucial" and "essential" to a fair trial (*Ibid*, at [96]). It had been "impossible" for the defence to call the two girls given their apparent subsequent hostility to their father and there had been no alternative but for the prosecution or the judge to have called them (*Ibid*). The Court of Appeal disagreed. There had been nothing to prevent the defence from calling the girls themselves (*Ibid*, at [100]). The prosecution had been entitled to regard the girls as "confused or wrong, and therefore unbelievable" in so far as they had supported the defence case (*Ibid*, at [99]).

<sup>252</sup> [2004] EWCA Crim 1340.

<sup>253</sup> [2004] EWCA Crim 1340 at [46].

<sup>254</sup> [2004] EWCA Crim 1340 at [38].

substitute for evidence. Cross-examination is to establish the evidence of the witness and it is on the evidence the jury are obliged to consider the case.<sup>255</sup>

[9.10.19] In such circumstances Kay LJ considered that both the prosecution and the trial judge were correct in refusing to call or tender Roberts. In relation to the extent of the prosecutor’s discretion in calling witnesses Kay LJ commented:

They had assessed the matter and they had concluded that they did not wish to have this evidence to support their case and that was a judgment they were entitled to make. We do not see there was any duty upon them to do otherwise and we remember that in this regard they have an unfettered discretion as to which witnesses they should call, fettered only to the extent that they are obliged not to take any course which may in any way impede the course of justice.<sup>256</sup>

[9.10.20] The decisions of the Court of Appeal in cases such as *Brown*, *Taylor* and *Bradish* represent a distinct move towards the adoption of an adversarial role for the prosecutor in the calling of witnesses. Indeed, the crucial principle that emerges from *Bradish* is the acknowledgement that the prosecution enjoys a very broad discretion in its choice of the witnesses to be called. The only fetter that governs the exercise of that discretion is that they cannot act in such a manner as would impede the course of justice. The formulation advanced by Kay LJ is virtually indistinguishable from that offered in the influential historical case of *R v Edwards* where Erle J had commented that the prosecutor could “lay such facts before the jury as he thinks the interests of justice demand” providing the prosecutor did not forget he was also a “minister of public justice.”<sup>257</sup> *Edwards* had endorsed the adversarial role of the prosecutor in his or her choice of witnesses and had rejected the minister of justice role. The judicial wheel seems to have turned full circle and *Bradish* represents a return, perhaps unwittingly, to the adversarial role of the prosecutor outlined in the *Woodhead* and *El Dabbah* line of authority. Both the minister of justice approach as suggested by Humphreys J in *Treacy* and the duty stated in *Oliva* to call any credible witnesses appear have been discarded by cases such as *Taylor* and *Bradish*.

## **Part 11: The Prosecutorial Role in Calling Witnesses in Practice in England: Reaffirmation of the Adversarial Advocate**

[9.11.1] The minister of justice role of the prosecutor in the calling of witnesses still lingers in England, at least in theory if not always in practice. *Oliva* has not yet been formally consigned to oblivion. Scrutiny of many of the modern English decisions that have addressed

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<sup>255</sup> [2004] EWCA Crim 1340 at [38]. The defence’s motivation in seeking to compel the Crown to call a witness such as Roberts raises suggestions of cynicism but I would question whether such defence tactics are unusual. Defence submissions on issues of unused material can also demonstrate a similar ingenuity for such “tailored” defences and a capacity to try to “snatch an undeserved victory under a cloak of confusion and obscurity which baffles judge and jury,” see *R v Chief Constable of West Midlands, Ex parte Wiley* [1994] 3 All ER 420 at 424 per Lord Templeman. See further the discussions in Chapter 5 at [5.6.10] and Part 10 of Chapter 6.

<sup>256</sup> [2004] EWCA Crim 1340 at [39].

<sup>257</sup> (1848) 3 Cox CC 82 at 83. See further the discussion of this case in Part 4 of Chapter 7 at [7.4.5]-[7.4.8].

the issue reveals a significant extension of the prosecutor's discretion not to call a material witness, though perhaps not quite yet a formal acceptance of the prosecutor's adversarial role in this regard. The position in England is quite different to that which has been adopted in Australia, as discussed in Chapter 8. It would now appear in England that, unlike Australia, any obligation on the part of the prosecution to call witnesses at trial does not extend to calling witnesses who are helpful to the defence case or harmful to the prosecution case. Any defence complaint that the absence of a witness's testimony might prejudice the case of the accused can, and is now ordinarily it appears in practice, resolved by the prosecution's comprehensive duty of disclosure. If the prosecution do not wish to call a witness, the solution is to serve the evidence of that witness on the defence and leave it to the defence whether to call that witness or not. The prosecution need not list a material witness on the back of the indictment. As a leading modern textbook observed in its 2005 edition:

Its [the prosecution's] duty is rather to inform the defence of all unused material, which will include statements taken from witnesses who are omitted from the committal bundle because their anticipated evidence contradicts the broad thrust of the prosecution case and/or lays the foundation for a defence. Providing that is done, the defence will be able to interview the witness and arrange for them to be at the Crown Court to testify as defence witnesses if necessary.<sup>258</sup>

[9.11.2] A later edition of the same textbook confirmed in its 2009 edition that the view that the prosecution must call all credible and relevant witnesses at trial is "misguided."<sup>259</sup> The prosecution is absolved from the responsibility of calling witnesses inconsistent with the broad thrust of its case once their evidence has been served on the defence.<sup>260</sup>

[9.11.3] It would appear that, although *Oliva* may ostensibly represent the law, in practice in England, unlike Australia, the duty of disclosure has eroded the restraints on the prosecution in its selection of witnesses and providing satisfactory disclosure has been made it is accepted practice for the prosecution to discard an unhelpful witness and leave it to the defence to call him or her.<sup>261</sup>

[9.11.4] The apparent adoption in England of an adversarial approach to the calling of witnesses, notwithstanding *Oliva* and similar cases, has been promoted by the shift in recent years in the English criminal process to a comprehensive system of active case management

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<sup>258</sup> Murphy (*Blackstone*, 2005 edition), Ch 2, n 87, 1566 at [D 14.6].

<sup>259</sup> Hooper, L, and Ormerod, D, *Blackstone's Criminal Practice 2009* (Oxford, Oxford University Press, 2009) p 1715 at [15.20].

<sup>260</sup> *Ibid*, 1717 at [15.27]. See also Keane, above n 179, 143, n 185 and Tapper, C, *Cross & Tapper on Evidence* (11<sup>th</sup> ed) (Oxford, Oxford University Press, 2007) p 73, n 215.

<sup>261</sup> This accords with my previous prosecutorial experience in England where this course of action was routinely applied, usually without defence objection.

and pre-trial hearings designed to streamline the trial process. This trend has proved influential in the criminal courts.<sup>262</sup> As Sir Robin Auld noted:

In recent years, and given added momentum by the Civil Justice reforms, the role of the court in case management has come to the fore. For many, the sooner the court takes hold of the case at an early preliminary stage, the better. The rationale for this is that the parties are not preparing their respective cases for trial as speedily or otherwise as efficiently as they should, and are not co-operating appropriately with each other on disclosure and identification of the issues. Accordingly, so the thinking goes, the police, prosecutors and professional lawyers need the goad of the court to make them do their jobs properly, and the defendant needs it to encourage him to focus on the nature of his defence, if any. The vehicle for the application of the goad is a pre-trial hearing of some sort.<sup>263</sup>

[9.11.5] This shift is confirmed by the *Criminal Procedure Rules 2005*<sup>264</sup> that reflect a “culture change in criminal case management.”<sup>265</sup> These Rules apply to all criminal courts and all stages of the criminal process and, as noted by Thomas LJ, “have effected a sea change in the way in which cases should be conducted...The rules make clear that the overriding objective is that criminal cases be dealt with justly; that includes... dealing with the case efficiently and expeditiously.”<sup>266</sup> Though Australia has not been immune to the modern shift to a case management approach in the conduct of criminal litigation,<sup>267</sup> this shift has not been as pronounced or far reaching as in England.<sup>268</sup> Studies in Australia continue to highlight major flaws in the management of criminal litigation and suggest greater scope for a more active

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<sup>262</sup> See *R v Chaaban* [2003] EWCA Crim 1012, *R v Jisl* [2004] EWCA Crim 696 and *R v K* [2006] EWCA Crim 724. See also McEwan, J, “The Changing Face of Criminal Litigation in England and Wales” (2010) 14 E & P 89-95. See further the references in Chapter 4, n 19.

<sup>263</sup> Auld, Ch 2, n 333, Ch 10 at [204].

<sup>264</sup> These are a set of comprehensive and consolidated Rules that apply to all criminal courts. They have now been replaced with the *Criminal Procedure Rules 2010*.

<sup>265</sup> Atkinson, D, and Moloney, T, *Blackstone’s Guide to the Criminal Procedure Rules 2005* (Oxford, Oxford University Press, 2005) p 1.

<sup>266</sup> *R v Chorley Justices, ex parte DPP* [2006] EWHC Admin 1795 at [20]. The Rules include in their objectives acquitting the innocent and convicting the guilty, dealing with the prosecution and defence fairly, respecting the interests of witnesses and dealing with the case in a way that takes into account the gravity of the offence, the complexity of what is in issue, the severity of the consequences to the defendant and others affected and the needs of other cases. Rule 1.2 imposes upon all the participants in a criminal case a duty to prepare and conduct the case in accordance with the overriding objective, to comply with the rules and, importantly, to inform the court and all parties of any significant failure, whether or not the participant is responsible for that failure, to take any procedural step required by the Rules. Rule 3.2 imposes upon the court a duty to further that overriding objective by actively managing the case. For an overview of the Rules see Atkinson and Moloney, above n 265.

<sup>267</sup> See Hunter *et al*, Ch 4, n 19, 712-716 at [14.2]-[14.9] and Gleeson, M, “The State of the Judicature” (2000) 216 ALJ 172-179. See further Chapter 4, n 19.

<sup>268</sup> There is no Australian equivalent of the *Criminal Procedure Rules* (either the 2005 or 2010 versions), in particular the sweeping provisions noted above in n 266.



and robust system of case management.<sup>269</sup> The comprehensive pre-trial case management system that now exists in England provides, as was suggested by the Court of Appeal in *Brown*, a means and opportunity for any issue as to who should call what witness to be identified and resolved well before trial,<sup>270</sup> and undermines any argument that the prosecution should call a witness As Birch notes:

... the pre-trial stage is now sufficiently geared to affording the defence the opportunity to make a timely decision to call a witness on their own behalf if the prosecutor has cause to elect not to do so. There is thus less of a need to force the prosecutor to call evidence which may benefit the defence on the ground that the evidence, which is necessary to a fair trial, would otherwise be lost. The advent of the plea and directions hearing forms a convenient focal point for the prosecution to decide whether to call a particular witness...<sup>271</sup>

[9.11.6] Despite the ostensible application in England from *Oliva* and *Grant* of the prosecutor's minister of justice role in calling witnesses, this role now appears heavily qualified in practice. In particular it is clear that a by-product of the development of the prosecution's modern duty of disclosure is the notion that it is permissible for the prosecution to be selective in its choice of witnesses at trial. The prosecution is free to discard witnesses that do not support its case. It appears unobjectionable, even expected, that the defence should generally call any witness it wishes to call who has been discarded by the prosecution. The defence will now be informed of the identity and evidence of that witness. Lord Hope in *R v Winston Brown*<sup>272</sup> echoed the view expressed by Diplock LJ in *Dallison v Caffery*<sup>273</sup> that it is not for the prosecution to perform the task of the defence in calling witnesses. Lord Hope made it clear that this view had not been altered by the development of the modern law of disclosure:

... the principle of fairness lies at the heart of all the rules of the common law about the disclosure of material by the prosecutor. But that principle has to be seen in the context of the public interest in the detection and punishment of crime. A defendant is entitled to a fair trial, but fairness does not require that his witnesses should be immune from challenge as to their credibility. Nor does it require that he be provided with assistance from the Crown in the investigation of the defence case or the selection, on grounds of credibility, of the defence witnesses. The legal representation to which he is entitled, usually with the benefit of legal aid, has the responsibility of performing these functions on his behalf. To repeat the words of Lord Diplock in *Dallison v Caffery* the duty of the prosecutor is to prosecute, not to defend. The important developments in the prosecutor's duty of disclosure since he wrote these words have not altered the essential point that there is a difference between the functions of the prosecutor and those of the defence. The prosecutor's duty is to prosecute

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<sup>269</sup> See, for example, Aronson, Ch 4, n 19; Wedderburn, M, and Balco, J, *Managing Trial Court Delay: An Analysis of Trial Case processing in the NSW District Criminal Court* (Sydney, NSW Bureau of Criminal Statistics and Research, 2000) and Payne, above n 245.

<sup>270</sup> See the previous discussion of *R v Brown & Brown* [1997] 1 Cr App R 112 in Part 9 of this Chapter.

<sup>271</sup> Birch, above n 34, 660.

<sup>272</sup> [1998] AC 367.

<sup>273</sup> [1964] 2 All ER 610 at 622. See further the discussion in Part 12 of Chapter 7 at [7.12.8].

the case fairly and openly in the public interest. It is not part of his duty to conduct the case for the defence.

The common law rules which I have described are designed to ensure the disclosure of material in the hands of the prosecutor which may assist the defence case. But, once that duty has been satisfied, the investigation and preparation of the defence case is a matter for the defence. That includes the tracing, interviewing and assessment of possible defence witnesses and material which may assist the defence case can be distinguished from material which may undermine it or may expose its weaknesses. The adversarial system under which trials in this country are conducted applies to the examination of witnesses in support of the defence case in the same way as it does to the examination of the witnesses for the Crown. No witness enters the witness box with a certificate which guarantees his credibility. Every witness can expect to be cross-examined upon the veracity or reliability of his evidence.<sup>274</sup>

[9.11.7] I would take this argument one step further. The modern law of disclosure has, not only left unaltered the adversarial approach to calling witnesses as outlined by Diplock LJ in *Dallison v Caffery*, but it has diminished, if not “largely extinguished,”<sup>275</sup> any rationale for the prosecutor as a minister of justice to call any and all witnesses with important information about the case at bar regardless of their value to the prosecution case.<sup>276</sup>

[9.11.8] In respect of disclosure the prosecutor must act as the candid minister of justice. However, it is my argument that, as will be discussed further in the next Chapter, in the choice of witnesses, the prosecutor should act as an adversarial advocate and not a minister of justice. The prosecution should be in a position, questions of proper disclosure and abuse of process aside, to present its case at trial as it sees fit. Such an approach reflects and promotes the adversarial nature of the modern criminal process and the prosecutor’s legitimate function within that process of seeking the conviction of the accused. This adversarial role further accords with the historical position arrived at in the *Woodhead, El-Dabbah* and the Australian line of authority predating *Apostilides*<sup>277</sup> which had rejected the prosecutor’s minister of justice role in calling witnesses. Finally, and perhaps most significantly, an adversarial role in the calling of witnesses takes account of the major changes in criminal procedure, notably the prosecution’s modern duty of comprehensive disclosure. It is no coincidence that, notwithstanding, cases such as *Oliva* and *Grant* that support the minister of justice role in calling witnesses, it now appears widely accepted in practice in England that providing the prosecution has made full disclosure, as suggested in *Balmforth* and applied in *Richardson*, of any relevant witness and their likely evidence that it is then open to the prosecution in its broad discretion not to call a material and credible witness. Unlike the stark position that would have confronted the typical defendant until relatively recent times, the modern defendant is aware of any relevant material in the prosecution’s possession and is free to call any witness whom the prosecution are unwilling

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<sup>274</sup> [1998] AC 367 at 379-380.

<sup>275</sup> Plaxton, M, “In Search of Prophylactic Rules” (2005) 50 McGill L J 127 at 137, n 37.

<sup>276</sup> *Ibid*, 137.

<sup>277</sup> See the discussion in Part 3 of Chapter 8.

to call. The notion of trial by ambush now firmly belongs to the past. Ultimately, as Alderson B suggested in *Woodhead* in 1848, “the only sensible rule” in an adversarial system is that the prosecuting lawyer should be free to call only those witnesses that he or she wishes in support of the prosecution case. This principle was described by a commentator to *Sterk* in 1972 (long before the development of the modern duty of disclosure) as a “very sound one.”<sup>278</sup> It is my argument that it is now an even more sound principle than it was in 1972.

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<sup>278</sup> WG, above n 44, 392.

# CHAPTER 10

## UNUSED MATERIAL AND CALLING WITNESSES: THE CANADIAN SOLUTION: RECONCILING THE MINISTER OF JUSTICE WITH THE ADVERSARIAL ADVOCATE?

*This Chapter considers the solution offered in Canada to reconciling the longstanding tension between the prosecutorial roles of minister of justice and adversarial advocate with respect to the disclosure of the prosecution case and the calling of witnesses at trial. It is acknowledged that, as outlined in Chapters 5 and 6, in respect of disclosure the prosecutor must act as the candid minister of justice. However, as suggested in Chapter 9, in respect of calling witnesses the prosecution should be entitled to assume an adversarial role and have a broad discretion in its choice of witnesses. This Chapter considers the three main arguments in favour of this proposition: first, the modern adherence to the minister of justice approach in calling witnesses is not soundly based in precedent (as outlined in Chapter 7); secondly, the fact that the prosecutor's broad discretion in calling witnesses reflects and promotes its proper position within a modern adversarial criminal process; and thirdly, that modern developments in criminal procedure, notably the development of the prosecutor's comprehensive duty of disclosure, have diluted any rationale for the minister of justice role in calling witnesses. This Chapter also considers the additional factors that might be raised against the adversarial role in calling witnesses. These arguments do not preclude the adoption of the adversarial role. The complex role of the modern prosecutor does not lend itself to a simple definition of general application but the "Canadian Solution" represents the most appropriate way forward.*

### Part 1: Introduction: the Canadian Solution?

"Crown counsel, of course, while bound by strict duties so as to ensure the integrity of the criminal justice system, however must operate in the context of an adversarial procedure. *Once he has satisfied the obligation to disclose the evidence* [my emphasis], it is for him in principle, to choose the witnesses necessary to establish the factual basis of his case. If he does not call the necessary witnesses or evidence, he exposes the prosecution to dismissal of the charge for having failed to establish its case completely in accordance with the reasonable doubt rule. However, once this obligation has been met

and if improper motives cannot be imputed to him, such as the desire, for example, to hide exculpatory evidence, as a general rule, he will be considered to have properly executed this part of his function in the criminal trial. *The defence may, at that time do its work and call its own witnesses, if it considers it appropriate to do so. In the tradition of the common law, on which Canadian criminal procedure is based, the case retains its adversarial nature and Crown counsel, while an officer of the court, does not act as defence counsel* [my emphasis].”<sup>1</sup>

[10.1.1] This was the view that was offered in 1994 by Lebel JA in the Canadian case of *R v V (J)*<sup>2</sup> in relation to what he perceived to be the appropriate role of the modern prosecutor in his or her choice of the witnesses to call at trial. Lebel JA not only rejected the longstanding notion that still commands resolute support in Australia (as discussed in Chapter 8), and to a lesser extent in England (as discussed in Chapter 9), that the prosecutor is required to call any material witnesses to the alleged offence, regardless of their value to the prosecution case but also offered some rationale for his rejection of such a requirement.

[10.1.2] Though the view of Lebel JA is at odds with the approach that has been adopted on this issue in Australia, or at least since the decisions in such cases as *Whitehorn* and *Apostilides* in the early 1980s,<sup>3</sup> it is my argument that Lebel JA has identified what should be the correct law in relation to the calling of witnesses by the prosecution at trial. I would further argue that Lebel J has also correctly identified the two main reasons justifying this approach. He suggested that any role or “duty” of the prosecution to call every material witness at trial had been overtaken by two crucial considerations, namely the adversarial character of the criminal process and developments in the law relating to disclosure. The prosecuting lawyer had been previously entitled to act as a partisan advocate<sup>4</sup> and/or rely on the largely unwritten constraints of the informal “Old Boys Act”<sup>5</sup> when considering what material in its possession to disclose to the defence. These regimes have been discarded in recent times in England,<sup>6</sup> Australia<sup>7</sup> and Canada.<sup>8</sup> Despite the problems of both principle and practice that have arisen, as discussed in Chapter 6, the prosecuting lawyer is now required to act as a minister of justice and must divulge to the defence the evidence upon which the prosecution intends to rely at trial as well as any unused material which might be relevant, whether such material advances the prosecution case or not. According to Lebel JA in *V(J)* this comprehensive duty of disclosure obviates the need for the prosecution to call all the material witnesses in a criminal trial. Lebel JA, echoing the comments of Diplock LJ in *Dallison v Caffery*, further emphasised that it is not for the prosecutor to do the work of the defence in the calling of witnesses. Rather, the prosecutor possesses a broad discretion in his or her selection of

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<sup>1</sup> *R v V (J)* (1994) 91 CCC (3d) 284 at 287-288 per Lebel JA.

<sup>2</sup> (1994) 91 CCC (3d) 284.

<sup>3</sup> See also Hinton, Ch 7, n 12, 260. See further the discussion in Part 4 of Chapter 8.

<sup>4</sup> See the discussion in Parts 2 and 3 of Chapter 5.

<sup>5</sup> See the discussion in Parts 4 and 6 of Chapter 5.

<sup>6</sup> See, for example, *R v Ward* [1993] 2 WLR 619. See further the discussion in Part 6 of Chapter 5.

<sup>7</sup> See, for example, *R v Mallard* (2005) 224 CLR 125. See further the discussion in Part 8 of Chapter 5.

<sup>8</sup> See, for example, *R v Stinchcombe* (1991) 68 CCC (3d) 1, *R v Egger* [1993] 2 SCR 451 at 467, *R v Chaplin* [1995] 1 SCR 727 at [21] and *R v Taillefer & Duguay* (2004) 233 DLR (4<sup>th</sup>) 227 at 236.

witnesses at trial as befits an active advocate in an adversarial system of criminal justice. Because the defence will now be fully appraised of any relevant material they should no longer be able to insist on the prosecution calling a witness. Instead it for the defence to call any witnesses they consider might be supportive of its case.

[10.1.3] The third main argument, though not alluded to by Lebel JA, in support of the prosecutor’s adversarial role in calling witnesses is the argument set out in Chapter 7 that the minister of justice conception of the prosecutor’s duty in calling witnesses was ultimately rejected, even in the 1800s. This was during a period when there was rationale for obliging the prosecution to call all material witnesses at trial regardless of their value to the prosecution case given the disadvantageous position of the accused in the newly adversarial criminal process.<sup>9</sup> The prosecutorial role of a minister of justice had emerged to help redress this imbalance (as discussed in Chapter 2). It is notable that even in the 1800s, when there was nothing like genuine parity between the prosecution and the defence, that the *Woodhead* and *El Dabbah* line of authority had ultimately resolved the conflict between the minister of justice and adversarial roles by finally recognising and upholding a broad degree of discretion in the prosecutor in its selection of witnesses. It is my argument, as outlined in Chapters 8 and 9, that those modern decisions in both England and Australia such as *Oliva* and *Whitehorn* that have applied the minister of justice role to the prosecution in its selection of witnesses have misapplied what had been a settled view of the law in this area. Subsequent decisions in England that have confirmed this role and those in Australia that have arguably extended it such as *Shaw*, *Kneebone* and *Dyers* have compounded the original error and have led the law into a confusing and unnecessary detour.

[10.1.4] It is notable that the Canadian courts subsequent to *V(J)*, in particular the crucial decision of the Supreme Court of Canada in *R v Cook*,<sup>10</sup> have affirmed Lebel JA’s approach and reasoning. No more persuasive discussion of what the law should be in this area and the reasons for such a view can be found than that provided in the landmark decision of *R v Cook*; first, in the dissenting judgement of Hoyt CJNB in the New Brunswick Court of Appeal and, secondly, in the opinion of L’Heureux-Dubé J delivering the unanimous judgment of the Supreme Court of Canada. In short the Canadian solution to what Shepherd J had noted as “the vexed question of when and in what circumstances a prosecutor is bound to call a witness,”<sup>11</sup> is that while the prosecutor in relation to questions of disclosure must for the reasons set out in Chapters 5 and 6 act as a candid minister of justice, in relation to the choice of witnesses at trial the prosecuting lawyer should be able to adopt an adversarial role and possess the broad discretion to select those witnesses that he or she sees fit.

[10.1.5] There are a number of objections of both principle and practice that may be directed at this approach. It may be argued that such a broad prosecutorial discretion in calling witnesses deprives the accused of the crucial ability to cross-examine a witness, it would risk the accused losing the right (if it exists in that jurisdiction) of last address to the jury, it may cause unfairness to compel the defence to call a witness who is

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<sup>9</sup> May, Ch 2, n 33, 108.

<sup>10</sup> (1997) 146 DLR (4th) 437.

<sup>11</sup> Shepherd, Ch 7, n 34, 242.

unsympathetic to their cause and “forcing” the defence to call a witness undermines the presumption of innocence or the prosecution’s burden to prove its case beyond reasonable doubt. Some of these objections (which were either dismissed by the Supreme Court in *Cook* or not even raised) are not without weight, but it is my argument that such objections do not justify or compel the prosecutor to adopt the minister of justice approach in calling witnesses. Rather, as identified in *Cook*, there are alternative remedies that can be employed to alleviate any genuine prejudice to the accused without imposing the duty on the prosecution to call at trial all material witnesses regardless of truthfulness, desire to testify or value to the prosecution case.

## **Part 2: *R v Cook*, The Prosecutor’s Adversarial Function: The Correct Solution?**

[10.2.1] The situation that presented itself in *Cook* was far from unusual in that the prosecution had been either unwilling or unable to call at trial the victim of the alleged offence. The accused had been convicted of assaulting a man called Dorbyson on the basis of the direct, albeit inconsistent, testimony of the victim’s girlfriend<sup>12</sup> and circumstantial evidence. The prosecution did not call Dorbyson at trial. No clear explanation for this had ever been given by prosecution counsel to either the jury or the trial judge.<sup>13</sup> Though the prosecution had arranged Dorbyson’s attendance at the trial the defence had also chosen not to call him. While the issue had not been raised at trial, the majority of the New Brunswick Court of Appeal<sup>14</sup> (Ryan JA, Ayles JA concurring; Hoyt CJNB dissenting) disapproved of the prosecution’s actions. Ryan JA was concerned about both the prosecutor’s failure to call Dorbyson and the absence of any proper explanation from prosecution counsel for this. Ryan JA asserted that it is a fundamental rule that the accused should have the opportunity to confront his or her accuser,<sup>15</sup> and that it would be a dangerous precedent to allow the prosecution at trial to refuse to call the victim without some good explanation.<sup>16</sup> Hoyt CJNB disagreed. He considered that the prosecution had been entitled not to call Dorbyson and there were a number of reasons why they might have acted in this manner. The Chief Justice accepted that the prosecution in its broad discretion could decline to call even a witness as crucial as the victim of the alleged offence. The Chief Justice considered that while some of the previous authorities could be construed as supporting the notion that the prosecution is required to call all the material

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<sup>12</sup> The girlfriend had proved to be less than an ideal witness. Her evidence had been “fraught with inconsistencies and crucial omissions” (1996) 107 CCC (3d) 334 at 339 per Ryan JA. It was also notable that in respect of two other alleged offences where she had been the victim the accused had been acquitted by the jury.

<sup>13</sup> Prosecution counsel did suggest, albeit equivocally, that Dorbyson, was not an ideal witness. He had fled the scene of the attack leaving his girlfriend to the mercy of his attacker and had been less than co-operative with the police.

<sup>14</sup> (1996) 107 CCC (3d) 334.

<sup>15</sup> Ryan JA traced the origin of this rule to *R v Lilburn* (1637) 3 St Tr 1315 but it arguably originates from the revulsion at the situation in *R v Raleigh* (1603) 2 St Tr 1. See further Chapter 2, n 20. The persuasiveness of this as an objection to the prosecutor’s adversarial role in calling witnesses will be considered further in Part 6 of this Chapter.

<sup>16</sup> (1997) 107 CCC (3d) 334 at 339-340. This view would undermine the modern practice in some jurisdictions to prosecute even in the absence of the victim, so called “victimless prosecutions.” See Chapter 4, n 280.

witnesses,<sup>17</sup> any such rule had not survived the development of the prosecution’s modern duty of disclosure. In this regard the prosecution had fully satisfied its obligations. Not only had the prosecution made “full disclosure”<sup>18</sup> of Dorbyson’s statement but they had even made him available at the trial had the defence wished to call him.

[10.2.2] On further appeal to the Supreme Court, L’Heureux-Dubé J speaking for the court in an unanimous decision, had no hesitation in rejecting the view of Ryan JA and in adopting both the view of the law and the reasoning of Hoyt CJNB and of Lebel JA in *V(J)*. Her Honour expressed surprise that, notwithstanding the wealth of judicial authority in support of the prosecutor’s adversarial role, there was still a view in some quarters that the prosecution is required to call any material witness regardless of their truthfulness, desire to testify or their effect upon the trial.<sup>19</sup> L’Heureux-Dubé J considered that the prosecution had a “complete discretion”<sup>20</sup> in its choice of witnesses and the prosecution had not been in error in declining to call Dorbyson.

### **Part 3: The History of the Law “Settled”: “Essential to the Narration” Explained**

[10.3.1] L’Heureux-Dubé J, in declaring her robust support for the prosecutor’s adversarial role in calling witnesses, drew heavily on the previous historical analysis provided by the Supreme Court almost half a century earlier in *R v Lemay*.<sup>21</sup>

[10.3.2] In *Lemay* the accused had been acquitted at a judge alone trial of selling drugs to an undercover police officer who testified that he personally knew the accused. The trial judge had disbelieved the accused’s account claiming that he was a victim of mistaken identity, but had been prompted in his decision, nevertheless, to acquit him because of the prosecution’s “failure” to call two witnesses called Powell and Lowes who had also been present at the alleged transaction. Powell was a police informer<sup>22</sup> and Lowes was an apparent associate of the accused.<sup>23</sup> The trial judge had applied the prosecution’s minister of justice role in calling witnesses in coming to this decision. The issue raised on appeal by the Crown was whether the trial judge had been entitled to acquit the accused on this basis. The Supreme Court considered that the trial judge had erred and a verdict of guilty was entered. In reaching this decision the Supreme Court considered both the

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<sup>17</sup> Hoyt CJNB, consistent with my previous argument, noted that *El-Dabbah* and Canadian cases such as *R v Lemay* [1952] 1 SCR 232; *R v Yebo* [1987] 2 SCR 168, (1987) 43 DLR (4<sup>th</sup>) 424 and *R v Black* (1990) 55 CCC (3d) 421 far from supporting the minister of justice role, had actually supported the prosecutor’s adversarial role in calling witnesses.

<sup>18</sup> (1997) 107 CCC (3d) 334 at 348.

<sup>19</sup> See *R v Wu* (1934) 62 CCC 90 at 101, *R v Chamandy* [1934] OR 208 at 211, *R v Taylor* (1970) 75 WWR 45, *R v Lachance* (1980) 5 WBC 315, *R v Jewell & Wiseman* (1981) 54 CCC (2d) 286, *R v Gill* (1987) 39 CCC (3d) 506 at 516-518 per O’Sullivan JA dissenting, *R v Fletcher* [1989] Carswell NS 639 and *R v Tupper* (1992) 307 APR 348.

<sup>20</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 459.

<sup>21</sup> [1952] 1 SCR 232.

<sup>22</sup> The whereabouts of Powell were not known. It appeared that he may have returned to the United States.

<sup>23</sup> Lowes had been with Lemay when Lemay had supplied the drugs to the undercover officer. Other than that Lowes had no connection with the case.



“obligation” of the prosecution to call witnesses and the historical origin of the purported rule to call “all material witnesses essential to the narrative.”

[10.3.3] The Supreme Court held that the prosecution possessed a full discretion in its choice of witnesses and in the absence of an “oblique motive” (of which there was no suggestion) the court would not interfere. Kerwin J and Locke J each referred to the historical authorities and held that those authorities supported this conclusion. Their Honours, in particular, thought that the decision of the Privy Council in 1936 in *R v Seneviratne*,<sup>24</sup> when properly considered and read in its context, did not support any minister of justice prosecutorial obligation to call all material witnesses essential to the narrative.<sup>25</sup> The correct position was expressed in the Privy Council’s later decision of *El Dabbah* upholding the prosecutor’s broad discretion.<sup>26</sup> Locke J considered that if there was any conflict between *Seneviratne* and *El Dabbah* (and he did not think that there was) then *El Dabbah* should be accepted.<sup>27</sup> Locke J maintained that any rule requiring the prosecution to call a “confederate”<sup>28</sup> of the accused such as Lowes was undesirable. Lowes might well support the accused’s account denying any involvement in the transaction. “From a practical viewpoint, if that was the law, far from furthering the due administration of justice, it would, in my opinion, actively retard it.”<sup>29</sup>

[10.3.4] Locke J considered that despite the contradictory authorities on the issue since *R v Simmonds* in 1823,<sup>30</sup> the law had been correctly stated in favour of the prosecutor’s adversarial role in *Woodhead* and *Cassidy* and that this position had been “settled”<sup>31</sup> by *El Dabbah*. This also represented the law in Canada. Though not as extensive as the historical analysis carried out in Chapter 7, it is telling that the Supreme Court in *Lemay* as a result of its own historical analysis, reached the same conclusion as expressed at the end of Chapter 7, namely that the historical authorities had ultimately rejected the minister of justice role in favour of the adversarial role in calling witnesses. This also accords with the views expressed by commentators of the period.<sup>32</sup>

[10.3.5] L’Heureux-Dubé J in *Cook* agreed with the conclusion reached in *Lemay*. Her Honour’s own review of the 20<sup>th</sup> century authorities originating from *Seneviratne* also exposed the fallacy of the argument that the prosecution had to call all material witnesses essential to the narrative, regardless of their benefit to the prosecution case. Despite the confusion and contradictions on this issue that had been expressed over the years to the present day, most notably by the Privy Council in *Seneviratne*, L’Heureux-Dubé J was able to cite in support of the prosecutor’s adversarial role in the calling of witnesses a

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<sup>24</sup> [1936] 3 All ER 36. See the previous discussion in Part 7 of Chapter 7.

<sup>25</sup> [1952] 1 SCR 232 at 239 per Kerwin J, 251 per Locke J and 256 per Cartwright J.

<sup>26</sup> *El Dabbah v Attorney-General of Palestine* [1944] 2 all ER 139. See further the discussion in Part 8 of Chapter 7.

<sup>27</sup> [1952] 1 SCR 232.

<sup>28</sup> [1952] 1 SCR 232 at 251.

<sup>29</sup> [1952] 1 SCR 232 at 252.

<sup>30</sup> (1823) 1 Car & P 84. See Chapter 7 for a detailed discussion of these authorities.

<sup>31</sup> [1952] 1 SCR 232 at 250 per Locke J.

<sup>32</sup> See, for example, Jervis, Ch 7, n 109.

formidable array of authority in addition to *Lemay*. This array of authority included *El-Dabbah*, various other decisions of the Supreme Court of Canada<sup>33</sup> (in particular the court’s unanimous decision in *R v Yebes*<sup>34</sup>) and a number of persuasive decisions of the provincial courts.<sup>35</sup> Though there were references in some of the earlier cases to the effect that the prosecution’s obligation is to call any witness “essential to the unfolding of the narrative of events upon which the Crown case was based,”<sup>36</sup> this did not translate in L’Heureux-Dubé J’s view (as many had attempted to suggest) into a duty for the prosecution to call at trial any witness with material testimony to give.<sup>37</sup> Rather, all that it meant in Her Honour’s opinion was that if the prosecution decided in the exercise of its broad discretion not to call a witness it risked leaving a gap in the prosecution case which could mean that the prosecution was unable to discharge its burden of proof and therefore entitle the defendant to an acquittal. L’Heureux-Dubé J explained that where witnesses are not called this could also become a factor for an appellate court to consider in determining whether a verdict was unreasonable and the decisions of the High Court of Australia in *Whitehorn* and *Apostilides* were examples of this proposition.<sup>38</sup>

[10.3.6] The flexible interpretation accorded in *Cook* to the expression “essential to the narrative” is not new. Earlier Canadian decisions had also accepted the prosecutor’s adversarial role in relation to its choice of witnesses.<sup>39</sup> Nevertheless, where the prosecution’s failure to call a material witness led to a “gap” in the prosecution case, an acquittal might well result. The verdict of not guilty entered in *R v McFadyen and Taylor*<sup>40</sup> demonstrates this principle.<sup>41</sup>

[10.3.7] Such cases demonstrates the perhaps self-evident point suggested in *Yebes* and *Cook* that acceptance of the prosecutor’s adversarial role in this area and of a broad discretion in the prosecution as to the choice of its witnesses, does not reduce the prosecutor’s obligation to tender sufficient evidence to prove its case beyond reasonable

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<sup>33</sup> See *R v Stinchcombe* (1991) 68 CCC (3d) 1. Though not cited by L’Heureux-Dubé J see also *R v Agostino* (1952) 102 CCC 112, *R v Vinette* (1974) 19 CCC (2d) 1 at 7-8 and *R v Caccamo* (1976) 54 DLR (3d) 685 at 703-704.

<sup>34</sup> [1987] 2 SCR 168 at 190-191.

<sup>35</sup> See *R v Franks* (1991) 67 CCC (3d) 280 and *R v V(J)* (1994) 67 CCC (3d) 280. Though not cited by L’Heureux-Dubé J see also *R v Tilford* [1935] 4 DLR 356, *R v Sing* [1936] 1 DLR 36, *R v Mandryk* [1939] 3 DLR 543, *R v Gibbons* [1947] 1 DLR 45 at 52-54, *R v McFayden & Taylor* (1967) 60 WWR 11, *R v Helpard* (1979) 49 CCC (2d) 35 at 50-51, *R v Johnston* (1981) 24 CR (3d) 125 at 129, *Cunliffe v Law Society of British Columbia* (1984) 11 DLR (4<sup>th</sup>) 280 at 293-295 and *R v Gill* (1987) 39 CCC (3d) 506 at 511-515 per Huband JA.

<sup>36</sup> See *R v Seneviratne* [1936] 3 All ER 36 at 49 per Lord Roche.

<sup>37</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 449.

<sup>38</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 449. The successful appeal against conviction to the High Court of the accused in *R v Whitehorn* (1983) 152 CLR 567 can be explained owing to the very weak nature of the prosecution case without the testimony of the victim, see the previous discussion in Part 4 of Chapter 8 at [8.4.1]-[8.4.2].

<sup>39</sup> See *R v McClain* (1915) 7 WWR 1134, *R v Brown* (1951) 2 WWR (NS) 395, *R v McFadyen & Taylor* (1967) 60 WWR 11, *R v Gill* (1987) 39 CCC (3d) 506 and *R v Black* (1990) 55 CCC (3d) 421 at 425.

<sup>40</sup> (1967) 60 WWR 11.

<sup>41</sup> The issue at trial was identification and the prosecution failed to call a witness to deal with a material “gap” in the identification evidence. See also *R v Brown* (1951) 2 WWR (NS) 395, *R v Campbell* (1983) 2 CCLS 82 and *R v Johnson* (2006) 791 APR 314 for other examples of this reasoning.

doubt. If the prosecution chooses not to call a material, or even a crucial, witness then it runs the risk of not being able to establish or sustain the guilt of the accused. The Canadian approach suggests that it is in this context only that it is correct to speak of the “obligation” or “duty” of the prosecution to call witnesses “essential to the narrative.” What is meant is not a literal obligation” or “duty” on the prosecution to call any such witness but rather a judicial reminder that while the prosecution is at liberty to present its case as it sees fit, the need remains to tender enough evidence to prove its case. Ultimately, it remains a matter for the discretion of the prosecution as to which witnesses it wishes to call at trial. As was pointed out by the Divisional Court in *Haringey Justices*<sup>42</sup> there will be a wide range of reasons in which the prosecution may validly not wish to call a material, or even vital, witness.<sup>43</sup> The witness may be incredible or unreliable<sup>44</sup> (though this is not the sole ground that the prosecution is entitled not to call a witness),<sup>45</sup> of young age,<sup>46</sup> scared,<sup>47</sup> partial or identify with the “camp” of the accused,<sup>48</sup> serve only to “confuse” the jury,<sup>49</sup> untraceable or evasive<sup>50</sup> or superfluous or unnecessary to the Crown case.<sup>51</sup> If the prosecution in its broad discretion chooses not to call even a vital witness then that is a tactical decision for the prosecution in an adversarial criminal system. If the prosecution is prepared to weaken, or even jeopardise, its case by not calling a significant witness then that is a calculated risk that is for the prosecutor and no one else to take. If the prosecution should fail to present enough evidence to prove the elements of the offence, “the only peril for not meeting this obligation is the Crown’s; the case will not be proven and an acquittal will follow.”<sup>52</sup>

[10.3.8] Even a witness as ordinarily crucial to the prosecution case as the victim of the alleged offence might be properly categorised by the prosecutor as not being “essential to the narrative.” L’Heureux-Dubé J in *Cook* considered that there was no such rule, as had been advanced by Ryan JA in the court below, to the effect that the prosecution is compelled to call at least the victim of the offence. Her Honour was unable to see any reason why the testimony of the victim in this respect should be treated any differently from that of any other witness.<sup>53</sup> She noted that any decision not to call the victim “in the

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<sup>42</sup> *R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828.

<sup>43</sup> [1996] 1 All ER 828 at 832.

<sup>44</sup> See, for example, *R v Tregear* [1967] 1 All ER 989, *Tran v Magistrates’ Court of Victoria* [1998] 4 VR 294 and *R v Dudko* (2002) 132 A Crim R 371.

<sup>45</sup> See *R v Richardson* (1974) 131 CLR 116 at 119 and 12. See further the discussion in Chapter 8 at [8.3.6].

<sup>46</sup> See *R v Whitehorn* (1983) 152 CLR 657. See further the discussion in Part 4 of Chapter 8 at [8.4.10].

<sup>47</sup> See, for example, *R v Montgomery* (1995) 16 Cr App R (S) 274, *R v Cole* [1997] 1 Cr App R (S) 228, *R v M (KJ)* [2003] 2 Cr App R 322 and *R v Sellick* [2005] 1 WLR 3257. This is a major factor in modern criminal cases, see *R v Davis* [2006] EWCA Crim 1155 at [8]-[12].

<sup>48</sup> See, for example, *R v Richardson* (1974) 131 CLR 116, *R v Kizon* (1985) 18 A Crim R 59 and *R v Shaw* (1991) 57 A Crim R 425.

<sup>49</sup> See, for example, *R v Nugent* [1977] 3 All ER 662 and *R v Mason* [1996] Crim LR 325.

<sup>50</sup> See, for example, *R v Lemay* [1952] 1 SCR 232 and *R v Cavanagh & Shaw* [1972] 2 All ER 704.

<sup>51</sup> See, for example, *Re: Van Beelen* (1974) 9 SASR 163, *R v Lawless* (1978) 142 CLR 659 and *R v Richardson* (1994) 98 Cr App R 174.

<sup>52</sup> *R v Passley* (2003) 176 Man R (2d) 53 at [8] per Suche J.

<sup>53</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 455.

vast majority of cases” was something that the prosecution would undertake at its “own peril” as the victim’s testimony would usually be necessary to prove the alleged offence.<sup>54</sup> In the absence of the victim the prosecution would have to adduce “some other evidence of a compelling nature”<sup>55</sup> to establish the defendant’s guilt beyond reasonable doubt. Furthermore if the prosecution was unable to point to some good reason for its refusal to call the witness, then it would be even more difficult for the prosecution to be able to prove the guilt of the accused.<sup>56</sup> But any decision not to call the victim remained a matter for the prosecution. “It is a tactical judgment which should properly be left to the discretion of the individual prosecutor.”<sup>57</sup>

[10.3.9] This proposition is sound. The victim may be reluctant for the “full weight of the criminal law to be brought to bear”<sup>58</sup> on the alleged offender.<sup>59</sup> As with any other witness there will be a wide range of circumstances in which the prosecution may either be unwilling or unable to call the victim of the alleged offence to testify. The victim may be too young,<sup>60</sup> too fearful or traumatised,<sup>61</sup> manifestly unreliable<sup>62</sup> or hostile to the prosecution cause<sup>63</sup> to be either able or willing to testify. The victim may simply be difficult to locate.<sup>64</sup> Though the defence may contend that it is unfair for the accused to be deprived of the ability to cross-examine the victim,<sup>65</sup> as Tapper notes, providing that there is alternative evidence to proceed upon, it is “not absolutely essential that the victim of a crime testify.”<sup>66</sup> The prosecution’s onus to establish its case beyond reasonable

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<sup>54</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 455.

<sup>55</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 455.

<sup>56</sup> Not only would the prosecution risk losing its case if it did not call the victim but the absence of a legitimate reason for such a decision would also enable the court to invite or draw a *Jones v Dunkel* style adverse inference against the prosecution.

<sup>57</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 455. See *R v Hackett* [2003] BCPC 479 where the prosecutor, relying on *Cook*, declined to call the alleged victim.

<sup>58</sup> Australian Law Reform Commission, *Domestic Violence (Report No 30)* (Canberra, Australian Government Publishing Service, 1986) p 14.

<sup>59</sup> This arises especially in cases of domestic violence, see *Ibid* and Hoyle, C, and Sanders, A, “Police Response to Domestic Violence” (2000) 40 Brit Jour Criminology 14-36.

<sup>60</sup> See, for example, *R v Whitehorn* (1983) 152 CLR 657.

<sup>61</sup> See for example, *R v Renshaw* [1989] Crim LR 811 and *CPS Durham v CE* [2006] EWCA Crim 1410. Victims of domestic violence are often particularly unwilling to testify for fear of retribution, see, for example Ellison, L, “Prosecuting Domestic Violence without Victim Participation” (2002) 65 Mod L Rev 834 at 839, n 29 and Corsilles, Ch 4, n 162, 870 and 872-873. See further De Sanctis, L, “Bridging the Gap between the Rules of Evidence and Justice for Victims of Domestic Violence” (1996) Yale Jour L and Feminism 359 at 367-374. See also Chapter 4, n 280.

<sup>62</sup> See, for example, *R v Oliva* [1965] 3 All ER 116. See the previous discussion in Part 2 of Chapter 9.

<sup>63</sup> See, for example, *R v Richardson* [2004] EWCA Crim 758 and *Eate v Police* (2004) 236 LSJS 376. Again this arises particularly with respect to domestic violence where the victim may be reconciled with the offender and adverse to proceeding, see Hanna, C, “No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions” (1996) 109 Harv L Rev 1849 at 1873-1877 and Corsilles, Ch 4, n 162, 871-872.

<sup>64</sup> See, for example, *Edwards & Osakwe v DPP* [1992] Crim LR 576.

<sup>65</sup> See, for example, *R v Cook* (1996) 107 CCC (3d) 334 at 344 per Ryan JA. See further the discussion in Part 7 of this Chapter.

<sup>66</sup> Tapper, Ch 9, n 260, 73.

doubt remains and it is difficult to see how the trial can be properly categorised as “unfair.” The prosecution will have, as is noted in *Cook*, a difficult task in establishing the accused’s guilt in the absence of the testimony of the victim, especially if there is no convincing explanation for the victim’s absence.

#### **Part 4: The Need for Broad Prosecutorial Discretion “For our System of Criminal Justice to Function Well”**

[10.4.1] The prosecutor performs a vital, though often overlooked and misunderstood, function in the criminal process.<sup>67</sup> The prosecutor must, as was discussed in Chapter 4, possess the ability and discretion to be able to exercise its crucial role effectively. A notable feature of the adversarial system is the broad degree of discretion that is typically accorded to prosecution lawyers. “In deciding what action to take,” as Fox remarks, “prosecutors at all levels possess a wide and largely unfettered discretion.”<sup>68</sup> The necessity for the prosecutor to retain this wide discretion in the initiation and conduct of criminal proceedings in an adversarial criminal process has been widely acknowledged.<sup>69</sup> The courts have traditionally proved highly reluctant to interfere with the exercise of prosecutorial discretion.<sup>70</sup> There are strong reasons of policy to justify this reticence. Kirby J in *DPP v Chow*<sup>71</sup> noted that in an adversarial system the judiciary should not intrude in the prosecution’s discretion as to how it conducts a criminal case. Such decisions “belong, in any case, by statute, tradition and the principled demarcation of the prosecutorial and judicial functions, not to the judiciary but to the prosecution.”<sup>72</sup> Kirby J emphasised that in relation to the calling of witnesses it is for the prosecutor and not the court to decide whether a person will be called as a witness. This is necessary for the “essential independence of that [prosecutorial] office in an adversary system which in turn is integral to its proper performance.”<sup>73</sup> The majority judgment of the Supreme Court of Canada in *R v Power*<sup>74</sup> supports this theme:

That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from case law. They have been so as a matter of principle based on the doctrine of

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<sup>67</sup> See also the discussion in Part 4(1) of Chapter 1 at [1.4.1.7].

<sup>68</sup> Fox, R, *Victorian Criminal Procedure* (8<sup>th</sup> ed) (Melbourne, Monash Law Book Co-Op Ltd, 1995) p 45.

<sup>69</sup> See, for example, *Imber v Patchman* (1976) 424 US 409 at 420, *Town of Newton v Rumery* (1987) 480 US 386 at 396, *Hoem v Law Society of British Columbia* (1985) 20 CCC (3d) 239, *R v Beare* [1988] 2 SCR 387 at 410, *R v T (V)* [1992] 1 SCR 749 at 760, *R v Jolivet* (2000) 144 CCC (3d) 97 at 107 and *R v Passley* (2003) 176 Man R (2d) 53. See also Wheeler, F, “Judicial Review of Prerogative Power in Australia: Issues and Prospects” (1992) U Syd L Rev 432 at 457. See also [1.3.1.7].

<sup>70</sup> See, for example, *DPP v Humphreys* [1977] AC 1 at 26 per Viscount Dilhorne, *Town of Newton v Rumery* (1987) 480 US 386 at 396; *R v Inland Revenue Commissioners, ex parte Mead & Cook* [1993] 1 All ER 772; *R v Power* (1994) 89 CCC (3d) 1 at 15-17 per L’Heureux-Dubé J; *R v Maxwell* (1996) 184 CLR 501 at 512 per Dawson and McHugh JJ, and 533-535 per Gaudron and Gummow JJ; and *Langtree v Trenerry* (1999) 152 FLR 117. See also Corns, C, “Judicial Termination of Defective Prosecutions: Stay Applications” (1997) 16 UTas L Rev 75 at 75-76 and Munday, Ch 9, n 29, 872. See also [1.3.1.7].

<sup>71</sup> (1992) 63 A Crim R 316.

<sup>72</sup> (1992) 63 A Crim R 316 at 325.

<sup>73</sup> (1992) 63 A Crim R 316 at 326.

<sup>74</sup> (1994) 89 CCC (3d) 1.

separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice and the fact that prosecutorial discretion is especially ill-suited to judicial review.<sup>75</sup>

[10.4.2] In *Cook* the court emphasised the importance of retaining this wide prosecutorial discretion, not just in general terms throughout the criminal process, but specifically in the choice of witnesses. The court rejected as undesirable the imposition of any “minister of justice” duty for the prosecution to call all the material witnesses, regardless of their value to its case:

It is immediately apparent that such a duty, if it were to be established would have a major impact upon the Crown’s ability to conduct its own case. It would be a clear interference with the broad discretionary powers which are said to be within the purview of the Crown attorney, and which are at the very heart of the adversarial process. As a general principle, we have recognised for our system of criminal justice to function well, the Crown must possess a fair deal of discretion. Moreover, this discretion extends to all aspects of the criminal justice system.<sup>76</sup>

[10.4.3] This is a powerful argument. The prosecution must possess both the ability and the wide discretion to enable it to effectively exercise its vital (but sometimes, in practice, overlooked)<sup>77</sup> role in an adversarial criminal process. “The State too is entitled to a fair trial.”<sup>78</sup>

## Part 5: Oblique Motive or Abuse of Process

[10.5.1] As was shown in Chapter 7<sup>79</sup> previous English decisions had acknowledged that the prosecutor’s discretion in calling witnesses, broad as it is, is not entirely unqualified. The prosecutor still must act as a “minister of public justice”<sup>80</sup> and has not to act with an “oblique motive.”<sup>81</sup> However, no further elaboration was provided as to what these expressions meant. Some indication of might constitute an “oblique motive” was provided in the English decision of *R v Wellingborough Justices, ex parte Francois*<sup>82</sup> where the Divisional Court held that the prosecutor on the facts of that case<sup>83</sup> had been motivated by an “oblique motive”<sup>84</sup> and that malice, misconduct or bad faith were not necessary

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<sup>75</sup> (1994) 89 CCC (3d) at 15. A detailed discussion of the various policy factors in favour of this view can be found at (1994) 89 CCC (3d) 1 at 13-20.

<sup>76</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 444-445.

<sup>77</sup> See, for example, *R v Kneebone* (2006) 67 NSWLR 659 and *R v MG* (2007) 69 NSWLR 20. See further the discussion in Part 5 of Chapter 4.

<sup>78</sup> *R v Karaibrahimovic* (2002) 164 CCC (3d) 431 at 449.

<sup>79</sup> *R v Edwards & Ors* (1848) 3 Cox CC 82 and *El Dabbah v Attorney General of Palestine* [1944] 2 All ER 139.

<sup>80</sup> *R v Edwards & Ors* (1848) 3 Cox CC 82 at 83.

<sup>81</sup> [1944] 2 All ER 139 at 144.

<sup>82</sup> (1994) 158 JP 813. The decision is further reported in a condensed form at (1994) 158 JPN 587.

<sup>83</sup> See the previous discussion in Part 7 of Chapter 9 at [9.7.1]

<sup>84</sup> (1994) 158 JP 813 at 817.

prerequisites to find such a motive.<sup>85</sup> The English cases raise the question of what amounts to an “oblique motive” and whether such a test affords a suitable guide for the exercise of the prosecution’s discretion in its choice of witnesses.

[10.5.2] In *R v Cook* L’Heureux-Dubé J noted that “oblique motive” had “garnered a prominent place in the jurisprudence”<sup>86</sup> but that it did not enunciate any clear test in defining the circumstances when the court might intervene in the prosecution’s selection of witnesses. L’Heureux-Dubé J suggested that the concept of an “oblique motive” is better understood as either an issue of a failure by the prosecution to conform to its modern duty to disclose some relevant material or akin to the doctrine of abuse of process. In relation to the later point Her Honour commented that rather than ask whether or not the prosecution had acted from an “oblique motive” it is preferable to consider whether the prosecution had intentionally abused its discretion in its choice of witnesses in some manner so as to fall within the general doctrine of an “abuse of process.” Her Honour noted that the finding of an “oblique motive” by its very name implied some improper conduct by the prosecution and it was “unlikely that that such a claim could arise without there being a legitimate abuse of process.”<sup>87</sup> This proposition was reaffirmed by the Supreme Court of Canada in *R v Jolivet*.<sup>88</sup> It was also adopted in the English cases of *Wilkinson*<sup>89</sup> and *Taylor*<sup>90</sup> in describing the circumstances in which a court might interfere in the prosecution’s choice of witnesses.

[10.5.3] The scope of the doctrine of abuse of process has been variously described as “very nebulous,”<sup>91</sup> “inevitably vague”<sup>92</sup> and “enormous.”<sup>93</sup> Though the boundaries of the doctrine of what amounts to an abuse of process are incapable of exhaustive definition<sup>94</sup> and are still under development,<sup>95</sup> the broad framework of this doctrine appears clear.<sup>96</sup> The test to be applied is that of fairness. The jurisdiction to stay can be exercised in many different circumstances. Nevertheless two main strands can be detected in the

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<sup>85</sup> A similar definition of an “oblique motive” was also expressed in *R v Russell-Jones* [1995] 3 All ER 239 at 244. See Chapter 9, n 168.

<sup>86</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 456.

<sup>87</sup> See also *R v Davydov* (1992) 13 CR (4th) 67.

<sup>88</sup> (2000) 144 CCC (3d) 97 at 108-109.

<sup>89</sup> *Wilkinson v CPS* (1998) 162 JP 591.

<sup>90</sup> *R v Taylor, The Times*, 11th December 1995.

<sup>91</sup> Spencer, Ch 1, n 190, 242.

<sup>92</sup> Corns, Ch 4, n 19, 82.

<sup>93</sup> Hunter *et al*, Ch 4, n 19 1267 at [24.57].

<sup>94</sup> See *R v Carroll* (2002) 213 CLR 635 at 657, *R v Edwards* [2009] HCA 20 at [33] and *R v Nicholson* [2010] SADC 80 at [7].

<sup>95</sup> See *Walton v Gardiner* (1993) 177 CLR 378 at 392 and *R v Martin* [1998] 2 WLR 1 at 6 noting that the categories of abuse of process are not closed.

<sup>96</sup> See *Jago v District Court of NSW* (1989) 168 CLR 23, *R v Edwards* [2009] HCA 20 and *R v Dupas* [2010] HCA 20 for an overview of the Australian law on abuse of process. See further Corker and Young, Ch 5, n 209 and Wells, Ch 6, n 139.

authorities.<sup>97</sup> First, there will be an abuse of process where the court concludes that, owing to some fundamental defect, it is impossible for the accused to receive a fair trial.<sup>98</sup> Secondly, abuse of process will exist where the court concludes that it would be unfair for the accused to be tried in that the proceedings would amount to a misuse or manipulation of the process of the court because it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.<sup>99</sup> In some cases the two categories may overlap and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse.<sup>100</sup>

[10.5.4] Arguments of abuse of process in criminal cases are now a familiar feature of the criminal process and have proved to be a “growth industry” over recent years.<sup>101</sup> However, recent decisions, notably of the High Court in *R v Dupas*,<sup>102</sup> have reiterated, the previously sometimes overlooked fact,<sup>103</sup> that such orders will only be justified in unusual circumstances.<sup>104</sup> In *Dupas* it was stated that a permanent stay is “a rare occurrence, a drastic remedy to be applied in exceptional cases which might arise if there has been some conduct on the part of the prosecution shown to [prevent] an accused person in obtaining a fair trial.”<sup>105</sup> The High Court in *Dupas*, endorsed as an “authoritative statement of principle”<sup>106</sup> an earlier ruling of the court that, “A permanent stay will only be ordered in an extreme case and there must be a fundamental defect ‘of such a nature

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<sup>97</sup> See *R v Beckford* (1996) 1 Cr App R 94 at 100, *R v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] AC 42 at 72 per Lord Lowry and *Sherlock v Police* [2009] SASC 64 at [64].

<sup>98</sup> See, for example, *Holmden v Biter* (1987) 47 SASR 509 (destroyed evidence), *R v Dietrich* (1992) 177 CLR 292 (legally unrepresented accused in serious criminal case), *R v Reeves* (1994) 122 ACTR 1 (lost records) and *R v Jenkins* [1998] Crim LR 411 (delay).

<sup>99</sup> See, for example, *R v Belmarsh Magistrates Court, ex parte Watts* [1999] 2 Cr App R 188 (vindictive private prosecution), *R v Early & Ors* [2003] 1 Cr App R 19 (investigators lying to prosecution counsel and judges in PII applications), *R v Grant* [2005] 2 Cr App R 28 (illegal police conduct in “bugging” privileged discussions between defendants and their lawyers that threatened to undermine the rule of law), *R v Mullen* [1999] 2 Cr App R 143 (unlawful deportation of accused) and *R v Schlesinger* [1995] Crim LR 137 (improper interference with potential defence witnesses).

<sup>100</sup> See, for example, *R v Birmingham & Ors* [1992] Crim LR 117 and *Duncombe-Walls v Police* (1998) 197 LSJS 398.

<sup>101</sup> See, for example, *R v Childs*, *The Times*, 30 November 2002; Corker and Young, Ch 5, n 209, 268 and Byrne, J, “The Right to a Speedy Trial” (1988) 62 ALJ 160. See further the discussion in Part 9 of Chapter 6 at [6.9.5]-[6.9.7].

<sup>102</sup> [2010] HCA 20.

<sup>103</sup> See, for example, *Police v Pakrou* [2008] SASC 364 at [42] and *Police v Sherlock* [2009] SASC 64 at [96]. See further Chapter 6, n 212.

<sup>104</sup> See, for example, *R v S* [2006] 2 Cr App R 23, *DPP v Meakin* [2006] EWHC Admin 1067 at [22], *Police v Pakrou* [2008] SASC 364, *Sherlock v Police* [2009] SASC 64, *R v Edwards* [2009] HCA 20 and *R v Dupas* [2010] HCA 20. This accords with earlier authority, see, for example, *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34, 58, 67 and 71-72, *Attorney-General’s Reference (No 1 of 1990)* [1992] QB 630; *R v O’Connor* (1995) 103 CCC (3d) 1 at 41-43; *Environment Agency v Stanford*, unreported, Divisional Court, 30 June 1998, No CO/4625/97 and *R v Childs*, *The Times*, 30 November 2002.

<sup>105</sup> *R v Dupas* [2010] HCA 20 at [33].

<sup>106</sup> [2010] HCA 20 at [18].



that nothing a trial judge can do in the conduct of the trial can relieve against its unfair consequences.”<sup>107</sup> In short an abuse of process is a “last resort” where all else fails.<sup>108</sup>

[10.5.5] It is logical and consistent with wider practice that any complaint about the prosecution’s selection of witnesses should be considered within the general concept of whether its actions amount to an “abuse of process” rather than asking if the prosecutor acted with an “oblique motive.” There may be circumstances in which the prosecutor’s choice of witnesses amounts to an “abuse of process.”<sup>109</sup> The doctrine of abuse of process provides some limited but necessary balance and constraint to the prosecutor’s otherwise broad discretion in its choice of witnesses.

## Part 6: Trial by Ambush and the Duty of Disclosure

[10.6.1] As was shown in Chapter 7 the duty to call witnesses developed in the first half of the 1800s in a context where the accused had no right to full disclosure by the prosecution of relevant material. The absence until recent years of a comprehensively articulated formal duty of disclosure upon the prosecution meant that the accused could well face trial without knowledge of significant, perhaps vital, information. It is against this background that the minister of justice role of the prosecutor in calling witnesses must be understood. There was a tenable argument, as discussed in Chapter 7, that the failure of the prosecution to call a material witness, whether that witness helped or hindered the prosecution case, could result in unfairness to the accused in the sense that he or she might well be deprived of testimony crucial to his or her case.<sup>110</sup> This argument still carried some weight until the late 20<sup>th</sup> century.<sup>111</sup>

[10.6.2] However, it is my argument that the emergence and confirmation of the prosecutor’s duty of disclosure has eroded the justification for any duty on the prosecution to call any material witness to the offence in question. This point has gone largely unnoticed in both Australia and England, with the notable exception of cases such as *Nicholson* and *Brent*. However, in Canada the position has been altogether different. In Canada with the development of the prosecutor’s duty of disclosure there was recognition that any purported rule requiring the prosecution to call all material witnesses would have to be reconsidered in light of the prosecution’s emerging duty of disclosure. In 1991 Sipinka J, delivering the unanimous judgment of the Supreme Court of Canada in the landmark case of *R v Stinchcombe*,<sup>112</sup> drew attention to the “wholly natural

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<sup>107</sup> *R v Glennon* (1992) 173 CLR 592 at 605-606 quoting *R v Barton* (1980) 147 CLR 75 at 11 per Wilson J.

<sup>108</sup> *R v O’Connor* (1995) 103 CCC (3d) 1 at 41.

<sup>109</sup> See, for example, *R v JAK* [1992] Crim LR 30.

<sup>110</sup> Though as discussed in Chapter 7, even in the 1800s the minister of justice view of the prosecutor’s duty in calling witnesses was never universally accepted and it was ultimately rejected in favour of the adversarial role.

<sup>111</sup> See, for example, Shapray, Ch 1, n 21, 13, who in 1969, well before the modern duty of comprehensive disclosure emerged, asserted, “It is obscure how the ends of justice and truth are best served by sanctifying such administrative discretion [to the prosecution in calling witnesses], apparently for its own sake, especially in light of the vast disparity in investigative techniques and resources between the Crown and the accused.”

<sup>112</sup> (1998) 68 CCC (3d) 1.

evolution of the law in favour of disclosure by the Crown of all relevant material.”<sup>113</sup> This duty extended to any material fact, whether favourable to the accused or not.<sup>114</sup> However, Sipinka J could “see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown’s case.”<sup>115</sup>

[10.6.3] The plain, if previously overlooked, link between the issues of calling witnesses and disclosure of unused material had been demonstrated in *R v Franks*.<sup>116</sup> The accused had been convicted at trial of the unlawful shooting of an elk. The prosecutor at trial had declined to call a witness called Keus who had been with the accused at the relevant time. The account of Keus had apparently not supported the prosecution’s case. The prosecution had made full disclosure of the material relating to Keus and he had been available in court for the defence to call had they so wished. The defence contended on appeal that the prosecution had acted wrongly in not calling Keus. The British Columbia Court of Appeal disagreed. Wallace J, delivering the court’s judgment, accepted that the prosecutor was required in his or her role as a minister of justice to conduct the prosecution case with the utmost candour and fairness to the defendant.<sup>117</sup> However, the “most obvious way” of ensuring that a fair trial was achieved was by the prosecution disclosing to the defence all the material that the prosecution had in its possession which related to the issues in the case, regardless of whether such material supported the defence or was otherwise detrimental to the prosecution’s position.<sup>118</sup> Given that the defence had been aware of the material about Keus and could have called him at trial, the prosecution had been entitled to exercise its discretion not to call him. Wallace J explained:

Where full disclosure has been made of the anticipated evidence of a witness or where defence counsel is otherwise cognisant of the existence of such evidence, I have difficulty in appreciating how the decision of the Crown not to call such a witness could reflect an ‘oblique’ or otherwise improper motive on the part of the prosecution, particularly when the witness was available in the court room to be called by defence counsel should he see fit to do so.<sup>119</sup>

[10.6.4] Any lingering doubt in Canada that the emergence of the prosecution’s modern duty of disclosure dictated a fundamental reconsideration of the justification of the rule that the prosecution was required to call at trial any material witness regardless of their value to the prosecution case was dispelled by the decision of the Supreme Court in *Cook*. Hoyt CJNB in the Court of Appeal observed that any purported obligation of prosecution counsel to call material witnesses at trial had to be looked at in light of *Stinchcombe*. The Chief Justice based his dissenting view upholding the prosecution’s refusal to call the victim of the assault on the fact that the prosecution had furnished the defence with the

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<sup>113</sup> (1991) 68 CCC (3d) 1 at 10.

<sup>114</sup> (1991) 68 CCC (3d) 1 at 11 and 14. See also *R v Lemay* [1952] SCR 232 at 257 per Cartwright J.

<sup>115</sup> (1991) 68 CCC (3d) 1 at 10. See also *R v Pizzardi* [1990] CarswellOnt 3184 and *R v Dell* [1994] 4 WWR 313.

<sup>116</sup> (1991) 67 CCC (3d) 280.

<sup>117</sup> (1991) 67 CCC (3d) 280 at 284.

<sup>118</sup> (1991) 67 CCC (3d) 280 at 285.

<sup>119</sup> (1991) 67 CCC (3d) 280.

material relating to him and it was for the defence to call him at trial. This theme was echoed and expanded by L'Heureux-Dubé J in the Supreme Court. Her Honour noted that the recent development in the law of disclosure and the resulting ability of the accused to call witnesses had "reduced considerably" the potential for unfairness.<sup>120</sup> The days of trial by ambush were effectively a thing of the past. Her Honour explained that she failed to see how a case could now arise where the defence would be "ambushed" in the sense that it was unaware of exculpatory material in the prosecution's possession.<sup>121</sup> If the prosecution had any such material it was bound disclose it. L'Heureux-Dubé J concluded:

In my view, any rationale compelling the Crown to call witnesses based on the need to bring all material facts forward was extinguished by developments in the law of disclosure. It is no longer correct to suggest that the defence will ever be 'ambushed' by the Crown's failure to call a material witness...The defence will not be prejudiced by this decision, as the Crown will still have to turn over the statement to the defence, and the defence will have the option to call that witness. ...In my view, there is simply no merit to the suggestion that the accused is 'ambushed' by the fact that a given witness is not called. Any existing unfairness in this regard can be resolved through disclosure and existing remedies, coupled with the accused's ability to call that witness.<sup>122</sup>

[10.6.5] The realisation in cases such as *Stinchcombe*, *Franks* and *Cook* that any purported rule requiring the prosecution to call all material witnesses had been overtaken by the development of the prosecution's duty of disclosure has been followed in cases subsequent to *Cook*.<sup>123</sup> In *R v Jolivet*<sup>124</sup> the Supreme Court accepted the proposition from *Cook* that the development of the prosecution's comprehensive duty of disclosure supported the broad discretion that the prosecution unquestionably enjoyed in its selection of witnesses.<sup>125</sup>

[10.6.6] An illustration of the application of these principles is found in *R v S (E)*.<sup>126</sup> In this case the defendant had been convicted of various sexual offences. The prosecution had failed to call at trial witnesses who could have testified about the timing and circumstances of the revelation made by one of the victims of the offences. The prosecution had provided full disclosure to the defence of this material. The defence complained at trial of the prosecutor's failure to call the witnesses. The trial judge, applying *Cook*, dismissed this complaint. The prosecution had a "very broad discretion" in its choice of witnesses and its only obligation is to call enough witnesses to prove the essential elements of the offence.<sup>127</sup> The defence had been provided with the relevant unused material and had had the choice to call the witnesses or not. The Ontario Court of Appeal agreed. The trial judge had been "correct" in his understanding and application of

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<sup>120</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 450.

<sup>121</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 450.

<sup>122</sup> *R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437 at 450-451.

<sup>123</sup> See *R v Harris* [2010] 2 WWR 477 at [42], *R v Williams* [2005] CarswellOnt 6791 and *R v Proulx* [2003] CarswellOnt 827.

<sup>124</sup> (2000) 144 CCC (3d) 97.

<sup>125</sup> (2000) 144 CCC (3d) 97 at 106.

<sup>126</sup> (2000) 129 OAC 146.

<sup>127</sup> (2000) 129 OAC 146 at [28].

*Cook*.<sup>128</sup> If the defence thought that the witnesses had cast doubt on the victim’s credibility in relation to her revelation of the offences, the defence had known of both the existence and anticipated evidence of the witnesses and could have called them.<sup>129</sup>

## Part 7: Loss of Right to Cross-Examination

[10.7.1] An objection that has been raised against the notion that the defence should have the obligation of calling a witness discarded by the prosecution is that such a course of action would be “unfair” as it would result in the defence losing the advantage of cross-examination of the witness if they, rather than the prosecutor, were compelled to call the witness.<sup>130</sup> This was the fear that so concerned Murphy J in *Shaw* and Ryan JA at the Court of Appeal in *Cook* and seen to justify the prosecutor’s duty to call any material witnesses. As Ryan JA asserted, “It is the opportunity to cross-examine not the fact of the cross-examination, that is crucial to the fairness of the hearing.”<sup>131</sup> Ryan JA viewed the prospect of the prosecution proceeding at trial without exposing a witness as crucial to its case as the alleged victim to cross-examination as a “dangerous precedent.”<sup>132</sup>

[10.7.2] This argument cannot be lightly dismissed. Though Wigmore’s celebrated opinion that cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of the truth”<sup>133</sup> has been increasingly doubted in recent years,<sup>134</sup> the perceived importance of cross-examination in an adversarial legal process remains.<sup>135</sup> As Justice Rosenberg notes extra-curially, “Cross-examination is the distinguishing feature of our adversary system.”<sup>136</sup> One famous English barrister in 1857 described the importance of cross-examination: “The issue of a cause rarely depends upon a speech and is but seldom even affected by it. But there is never a cause contested,

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<sup>128</sup> (2000) 129 OAC 146 at [30].

<sup>129</sup> (2000) 129 OAC 146 at [33].

<sup>130</sup> See, for example, *R v Fletcher* [1989] CarswellNS 639, *R v Dedam* [1991] Carswell NB 257 and *R v H (J)* (1996) 16 OTC 69.

<sup>131</sup> (1996) 107 CCC (3d) 334 at 344.

<sup>132</sup> (1996) 107 CCC (3d) 334 at 344.

<sup>133</sup> Wigmore, J, *A Treatise in the System of Evidence in Trials at Common Law* (Chadbourn (rev) (New York, Little Brown and Co, 1974) p 32 at [1367].

<sup>134</sup> See, for example, Hughes, T, “The Assessment and Credibility of Witnesses” (1996) 2 TJT 295 and Eastwood, C, and Patton, W, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (Brisbane, Queensland University of Technology, 2002) p 4-5: “The purpose of cross-examination has very little, “if anything to do with accuracy or truth. Rather the purpose of cross-examination is more a process of manipulating the witness through suggestive questioning, avoiding unfavourable disclosures and obtaining jury sympathy. Cross-examination techniques are specifically designed to damage the effectiveness of the testimony and mute the voice of the complainant.” See generally Frankel, Ch 1, n 33.

<sup>135</sup> See, for example, *Ex parte Lloyd* (1830) Mont 70 at 72, n; McBarnet, Ch 1, n 158, 194 and Ellison, L, “The Protection of Vulnerable Witnesses in Court: an Anglo-Dutch Comparison” (1993) 3 E & P 29 at 35. The importance of being able to challenge the evidence of a decisive witness has also been recognised under the ECHR, see *Luca v Italy* [2003] 36 EHRR 46 and *Al-Khawaja & Tahery v United Kingdom* [2009] ECHR 110. But see *R v Sellick* [2005] 1 WLR 3257 and *R v Horncastle* [2009] EWCA Crim 964 for an opposing view.

<sup>136</sup> Rosenberg, M, “The Contribution of Chief Justice Lamer to the Development of the Law of Hearsay” (2000) 5 Can Crim L Rev 115 at 119.

the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination."<sup>137</sup>

[10.7.3] However, despite this faith in the value of cross-examination, the argument raised by Ryan JA was rejected in *Cook* by L'Heureux-Dubé J. Her Honour was adamant that there was no prejudice caused to the accused by the mere fact that the defence were unable to cross-examine every potential witness in the case, whether the prosecution had wished to call them or not.<sup>138</sup> Her Honour, after referring with approval to the previously quoted passage of Lebel JA in *V (J)*,<sup>139</sup> dismissed Ryan JA's reasoning<sup>140</sup> as infringing the adversarial nature of the criminal trial:

The adversarial nature of the trial process has been recognised as a principle of fundamental justice. As such it should be construed in a way that strikes a fair balance between the interests of the accused and those of society. With respect, I fail to see why the defence should not have to call witnesses which are beneficial to its own case. The adversarial process functions on the premise that it is the obligation of the Crown to establish its case beyond a reasonable doubt. Once this threshold has been surpassed, however, it is up to the accused to call evidence or face conviction on point<sup>141</sup>...The adversarial nature of the trial process has been recognised as a principle of fundamental justice. As such it should be construed in a way that strikes a fair balance between the interests of the accused and those of society. *In my view, placing an obligation upon the Crown to call all witnesses with information on the case would disrupt the inherent balance of our adversary system* [my emphasis].<sup>142</sup>

[10.7.4] What is important is that, the defence is not deprived of the opportunity of eliciting the testimony of the witness. Rather the defence are denied the opportunity to cross-examine that witness. The defence are not "kept in the dark" of either the identity or the account of the witness not called by the prosecution. It is a decision for them as to whether they wish to call the witness and elicit his or her testimony.

[10.7.5] L'Heureux-Dubé J accepted that there might be "rare cases" in which the tactical disadvantage to the defence would be such that it would be manifestly unfair to ask the defence to call a potentially hostile witness.<sup>143</sup> However, the answer to such cases is not to insist on the prosecutor calling those witnesses, but rather to preserve the defence right of cross-examination by other means. Alternative measures might also be considered to alleviate any prejudice to the accused. These included asking the judge to

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<sup>137</sup> Cox, E, "The Advocate: His Training, Practice, Rights and Duties. Cross-Examination," *The Law Times*, 20 September 1851, 246 at 247.

<sup>138</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 453. See also *R v O'Brien* (19996) 66 SASR 396 at 399 and *R v Rigney* (2005) 241 LSJS 172 at [19] where, in contrast to *R v Shaw* (1991) 57 A Crim R 425 at 436 per Murphy J and 450 per Nathan J, the Court of Appeal of South Australia accorded little significance to the fact that the defence had lost their ability to cross-examine a witness whom the prosecution had been entitled not to call. See further the discussion in Part 6 of Chapter 8 at [8.6.5]-[8.6.6].

<sup>139</sup> (1994) 91 CCC (3d) 284 at 287-288. See the earlier reference at [10.1.1].

<sup>140</sup> And by implication the similar reasoning of Murphy J in *R v Shaw* (1991) 57 A Crim R 425 at 436.

<sup>141</sup> See *R v Weissensteiner* (1993) 178 CLR 217

<sup>142</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 452.

<sup>143</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 453.

comment on the absence of the witness (perhaps through drawing an adverse inference against the prosecution if its explanation for not calling the witness is inadequate), the defence might comment on the witness’s absence or the judge might, as already discussed, find that the prosecutor’s refusal to call the witness amounts to an “abuse of process” and stay the proceedings.<sup>144</sup>

[10.7.6] A particular remedy suggested by L’Heureux-Dubé J might for the judge to call the witness him or herself and preserve the defence’s right of cross-examination.<sup>145</sup> Her Honour, echoing a familiar theme,<sup>146</sup> emphasised that this was a power only to be “exercised in rare cases so as to avoid overly interfering with the adversarial nature of the procedure.”<sup>147</sup> Cory J, delivering the majority judgement of the Supreme Court of Canada in the earlier case of *R v Finta*<sup>148</sup> had recognised the trial judge’s “limited discretion” to call a witness if “it is necessary for the discovery of truth or in the interests of justice.”<sup>149</sup> His Honour had made it clear that any discretion to call a witness should only be rarely exercised and with “extreme care”<sup>150</sup> and in such a manner as not to interfere with the adversarial nature of the criminal trial or to prejudice the accused. This power should not be solely exercised in order to enable the defence to avoid calling a witness and to preserve their entitlement to cross-examination.<sup>151</sup> Despite this caution it is significant that on a number of occasions in Canada judges have been prompted to call a material witness discounted by the prosecution in the interests of justice in order to avoid undue prejudice to the defence arising from the deprivation of their ability to cross-examine that witness.<sup>152</sup> Indeed, Cory J accepted that the facts of *Finta* provided one example where it had been proper for the trial judge to call the witnesses.<sup>153</sup>

[10.7.7] Indeed, the judicial flexibility has even extended to allowing the defence to cross-examine a witness whom they have been compelled to call (after prosecution counsel and the trial judge had refused to do so) who was deeply unsympathetic to the defendant without that witness being declared hostile.<sup>154</sup>

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<sup>144</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 452-453. See also *R v Jolivet* (2000) 144 CCC (3d) 97 at 108-109.

<sup>145</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 452.

<sup>146</sup> See Chapter 7, n 156 and Chapter 8, n 108.

<sup>147</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 458. See also *R v Finta* [1994] 1 SCR 701.

<sup>148</sup> [1994] 1 SCR 701.

<sup>149</sup> [1994] 1 SCR 701 at 861. See also *R v Damic* (1982) 6 A Crim R 35 at 47.

<sup>150</sup> [1994] 1 SCR 701 at 857.

<sup>151</sup> See, for example, *R v Ridley*, *The Times*, 21 March 1969.

<sup>152</sup> See *R v Dedam* (1991) 122 NBR (2d) 385, *R v H (J)* (1996) 16 OTC 69 and *R v SG* [2007] CanLii 20675.

<sup>153</sup> The trial judge had properly acted in Cory J’s view to call three important witnesses that the prosecution had been unwilling to call at the trial of a former Hungarian police officer for his alleged involvement in wartime atrocities some 45 years earlier. Their evidence supported the defence’s suggestion that another man may have been the culprit. The primary reason according to Cory J that the trial judge had called the witnesses was to ensure that the jury had all the essential evidence before it. Significantly the accused was acquitted. The secondary reason was the trial judge’s wish to preserve the defence’s right of last address, see further the discussion in Part 8 below.

<sup>154</sup> *R v Hankey* [2008] CanLII 68105 adopting the suggestion in *R v Rose* (2001) 53 OR 417 that the court has an inherent power to regulate its proceedings in order to avoid unfairness or injustice. See also *R v Thynne* [1977] VR

[10.7.8] Though the judge's discretion to call a witness must be exercised with caution, it is arguable that, as suggested in *Cook*, a trial judge's willingness in an appropriate and demonstrated case to call a witness is an appropriate solution. The prosecution's broad adversarial discretion in its choice of witnesses is retained but if the defence are inordinately prejudiced by the loss of the ability to cross-examine a particular witness, then that ability is preserved by the judge calling that witness and both sides having the same opportunity to cross-examine that witness.<sup>155</sup> It may be that, as will be suggested in Part 9 of this Chapter, a limited extension to the ability and/or the willingness of the trial judge to call a material witness discarded by the prosecution is justified if in the circumstances of the particular case it would be wrong or manifestly unfair to expect the defence to call the witness.

## Part 8: Losing Right of Last Reply

[10.8.1] Another objection that was raised by Ryan JA in the Court of Appeal in *Cook* against asking the defence to call an unused witness was that to oblige the defence to call the witness would result in the defence, in Canada at least, losing the right to address the jury last. This consideration is acknowledged to be significant and cannot be dismissed in those jurisdictions that still confer on the prosecution the right of last address if the defence should call a witness.

[10.8.2] The tactical importance for counsel to retain the right of last address, especially before a jury, is not new. Cairns highlights that with the passage of the *Prisoners Counsel Act* in 1836 defence counsel were required to choose "between evidence and last word eloquence."<sup>156</sup> Defence counsel placed such faith in the persuasive power of their last address to the jury that they would often rather withhold relevant, favourable and even potentially decisive testimony in order to secure the last word to the jury.<sup>157</sup> In a modern context the right of last address still carried considerable weight.<sup>158</sup> The Supreme Court of Canada notes that many experienced and able counsel and others still value "having the last word."<sup>159</sup> The right of last address "remains an important psychological or tactical issue in a jury trial."<sup>160</sup> Ian McClintock SC in 2009 described the ability of the defence to address the jury last as a "significant advantage" and noted that the previous position in

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98 and *R v Walsh* [1999] VSC 367 where the courts were also willing in order to ensure a fair trial to depart from the usual rules and allow the defence to cross-examine a witness called by them.

<sup>155</sup> Neither side has any "right," as such, to cross-examine a witness called by the judge but Newark and Samuels note that "manifestly it would be unthinkable for the judge not to allow the prosecution and the defence in that order, to cross-examine the witness, and in particular where the evidence was unfair to one of the parties," see Newark and Samuels, Ch 8, n 102, 403. See also *R v Damic* (1982) 6 A Crim R 35 at 41.

<sup>156</sup> Cairns, Ch 2, n 43, 108.

<sup>157</sup> *Ibid*, 107-108.

<sup>158</sup> See the discussion in *R v Rose* [1998] 3 SCR 262 and Curthoys, J and Kendall, C, *Advocacy: an Introduction* (Lexis Nexis Butterworths, Chatswood, 2006) p 191. Michael Hodgman QC, a highly experienced Tasmanian criminal lawyer, has informed me that in Tasmania the prospect of losing the right of last address to the jury is a very real factor in the deliberation of any trial lawyer in whether or not to call any witnesses for the defence apart from the accused.

<sup>159</sup> *R v Lyttle* (2004) 180 CCC (3d) 476 at [9].

<sup>160</sup> *R v Giroux* (2002) 166 CCC (3d) 427 at [53].

New South Wales when prosecution counsel had addressed last and relied heavily on the “destruction” of the defence counsel’s address “was much more uncomfortable for the defence.”<sup>161</sup>

[10.8.3] However, in some jurisdictions this argument now carries limited weight. In England the usual modern practice is that the defence retain the right of last address.<sup>162</sup> A similar situation exists in all Australian jurisdictions,<sup>163</sup> with the notable exceptions of Queensland<sup>164</sup> and Tasmania.<sup>165</sup>

[10.8.4] Even in those jurisdictions that do retain the prosecution’s right of last address, the Supreme Court in *Cook* considered that the loss of the defence’s right to last address before the jury was not sufficient to warrant impeding the discretion of the prosecution to produce at trial the witnesses that the prosecution chose. Rather L’Heureux-Dubé J considered that a “preferable, flexible solution” to alleviate any prejudice to the accused from losing the right of last address was not to compel the prosecution to call the witness but for the judge to consider calling the witness him or herself.<sup>166</sup>

[10.8.5] This proposition has been applied in subsequent cases. In *R v Passley*,<sup>167</sup> for example, Sucho J noted that a “compelling, or at least, common reason”<sup>168</sup> for judges in Canada to call a witness was in order to retain the defence’s right of last address. His Honour described this as “an important consideration.”<sup>169</sup> As with the inability to cross-examine a witness, the retention of the defence’s right of last address has been significant in Canada on occasion in persuading the trial judge to exercise his or her discretion and call a witness.<sup>170</sup>

## Part 9: Unfair to the Accused to call a Witness?

[10.9.1] Though not made expressly clear by *Cook* it is not difficult to conceive of other circumstances beyond the loss of any right to last address and to cross-examination of the witness in which it would be unfair to expect the defence to call a particular witness and the other options suggested by L’Heureux-Dubé may prove to be inadequate. The defence

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<sup>161</sup> McClintock, I, “Addressing Juries,” Paper delivered at Public Defenders Criminal Law Conference, Sydney, 7 March 2009, available at: [http://www.lawlink.nsw.gov.au/lawlink/pdo/ll\\_pdo.nsf/pages/PDO\\_addressingjury](http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_addressingjury).

<sup>162</sup> See Murphy (*Blackstone*, 2005 edition), Ch 2, n 87, 1552 at [D 16.9]. See further *R v Bryant* [1979] QB 108 at 113-118.

<sup>163</sup> See s 294 of the *Crimes Act 1900* (ACT), s 160 of the *Criminal Procedure Act 1986* (NSW), s 235 of the *Criminal Procedure Act 2009* (Vic), s 363 of the *Criminal Code* (NT), s 145 of the *Criminal Procedure Act 2004* (WA) and s 288B of the *Criminal Law Consolidation Act 1935* (SA)

<sup>164</sup> See s 619 of the *Criminal Code 1899* (Qld).

<sup>165</sup> See s 371 (c) and (d) of the *Criminal Code* (Tas).

<sup>166</sup> (1997) 146 DLR (4<sup>th</sup>) 437 at 454.

<sup>167</sup> (2003) 176 Man R (2d) 53.

<sup>168</sup> (2003) 176 Man R (2d) 53 at [18].

<sup>169</sup> (2003) 176 Man R (2d) 53 at [18].

<sup>170</sup> See, for example, *R v Finta* [1994] 1 SCR 701 at 861, *R v Giroux* (2002) 166 CCC (3d) 427, *R v Bartkowski & Ors* [2005] BCSC 782 at [10], and *R v SG* [2007] CanLii 20675. Contrast *R v Milchanovic* [1999] QCA 239.



may wish to adduce the testimony of an expert witness whose evidence is important to the issues before the court but they are unable to afford the cost of his or her services and attendance at trial.<sup>171</sup> Another situation that may arise is that the witness may be hostile or antagonistic to the accused. As was acknowledged by Suche J in *R v Passley*,<sup>172</sup> the “tactical disadvantage to the defence of calling a potentially hostile witness would be manifestly unfair.”<sup>173</sup>

[10.9.2] *Passley* provides an example of such a situation. The accused was charged with sexual assault. A witness called Anders had displayed hostility and resentment at the prospect of testifying.<sup>174</sup> Prosecution counsel had declined pursuant to *Cook* to call the witness. The defence was keen to adduce Anders’ testimony and contended that his evidence was “relevant, and perhaps important to both the question of identity and to the credibility of the complainant.”<sup>175</sup> Suche J agreed that Anders’ evidence was relevant and part of the essential narrative of the case.<sup>176</sup> His Honour considered that, although prosecution counsel had properly declined to call Anders, the defence would be at a “tactical disadvantage” to call such an “unpredictable witness” and this course of action would be “manifestly unfair.”<sup>177</sup> In those circumstances Suche J agreed to exercise his discretion to call Anders.

[10.9.3] Another illustration of a similar situation is provided in *R v G*.<sup>178</sup> The accused was charged with sexually assaulting a young girl. He had been the partner of her mother. The victim still resided with her mother. Prosecution counsel, as part of her “virtually untrammelled right”<sup>179</sup> pursuant to *Cook* to present the prosecution case as she wished, refused to call the mother. The mother’s evidence was mixed in that whilst it incriminated the accused in broad terms it did not wholly support her daughter’s account. Though the defence were willing to call the mother the trial judge, Spies J, was very uneasy at such a prospect. Not only would this mean that the defence would lose the right

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<sup>171</sup> See *R v S (PR)* (1987) 38 CCC (3d) 109. In this case the trial judge’s decision to call an expert witness who supported the defence case (the accused was unable to meet the expert’s fees) was upheld, though there was an unseemly dispute between the court and the prosecution as to who would meet the witness’s expenses. See also *R v Ridley*, *The Times*, 21 March 1969; *R v Talbot* (No 2) (1977) 38 CCC (2d) 560 and *R v Damic* (1982) 6 A Crim R 35.

<sup>172</sup> (2003) 176 Man R (2d) 53.

<sup>173</sup> (2003) 176 Man R (2d) 53 at [19]. In such circumstances the defence at common law are constrained in seeking to impugn the credit of the unfriendly witness unless that witness is declared hostile and this is far from guaranteed. See further Chapter 9, n 26. However, in the *Uniform Evidence Act* jurisdictions in Australia the wider power that now exists under s 38 of the Act for a party to impugn an “unfavourable” witness and the greater opportunity for a party to cross-examine a witness called by that party may dilute this as an objection to the defence being expected to call an unfriendly witness. cf *R v Kanaan* [2006] NSWCCA 109 at [84]. See further the discussion in Part 10 below.

<sup>174</sup> The witness was angry at the disruption to his employment.

<sup>175</sup> (2003) 176 Man R (2d) 53 at [6].

<sup>176</sup> (2003) 176 Man R (2d) 53 at [20].

<sup>177</sup> (2003) 176 Man R (2d) 53 at [21].

<sup>178</sup> [2007] CanLii 20675. See also *R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828 at 833 (see the discussion in Part 9 of Chapter 9 at [9.9.5]-[9.9.6]), *R v Pederson* [2002] BCSC 1593 and *R v Mercer* (2005) 202 CCC (3d) 130 where the courts were also open to calling a witness who was unfriendly to the defence.

<sup>179</sup> [2007] CanLii 20675 at [17].

of last address but the prosecution would be able to cross-examine a witness sympathetic to their case whilst the defence would be compelled to examine-in-chief a witness fundamentally hostile to their cause.<sup>180</sup> Her Honour was further perturbed at the likely trauma to both the victim and her mother if the defence were required to call the mother to testify against her daughter in favour of her alleged abuser.<sup>181</sup> In these circumstances Spies J, in a far from subtle invitation to prosecution counsel,<sup>182</sup> declared that she would call the mother herself unless prosecution counsel reconsidered her refusal to do so.

[10.9.4] It is acknowledged that it would be rare for the trial judge to call a witness to retain the defence’s right of cross-examination, the right of last reply or to otherwise prevent unfairness to the accused. The positive exercise, however, of this discretion by trial judges should not be discounted. Though the trial judge in an adversarial system should not enter the “fray of combat” or assume the mantle of counsel,<sup>183</sup> the role of the trial judge is more than that of a mere umpire.<sup>184</sup> It would be wrong for trial judges to revert to the inquisitorial approach to calling witnesses shown in some of the historical cases discussed in Chapter 7.<sup>185</sup> Such an approach would undermine the adversarial criminal system and represent an undesirable extension of judicial power. The trial judge should not call a witness if the defence would in no way be genuinely prejudiced by calling the witness themselves.<sup>186</sup> “The defence cannot hope to use the judge to call their witness to call their witness to give him a greater appearance of objectivity.”<sup>187</sup> This would represent an “unwarranted judicial intrusion in the adversary process.”<sup>188</sup> Such a witness should be clearly called by the defence.

[10.9.5] However, as Pattenden argues, “Yet when all is said and done there are occasions when a judge may find the temptation to call a witness irresistible.”<sup>189</sup> It is far from unusual in practice, in England at least, that the parties may not have called even an important witness.<sup>190</sup> There will be circumstances as in *Passley* or *G* where “it is necessary for the discovery of truth or in the interests of justice”<sup>191</sup> for the trial judge to

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<sup>180</sup> [2007] CanLii 20675 at [29].

<sup>181</sup> [2007] CanLii 20675 at [28].

<sup>182</sup> The trial judge reminded prosecution counsel of the wisdom of placing before the court any evidence which might have an important bearing on the crime and in no uncertain terms of her role as a minister of justice even though her refusal to call the mother was “arguably within bounds” [2007] CanLii 20675 at [24]-[25].

<sup>183</sup> See Silverman, H, “The Trial Judge: Pilot, Participant or Umpire” (1973) 11 Albta L Rev 40.

<sup>184</sup> See *Jones v National Coal Board* [1957] 2 QB 55 at 63 per Denning LJ and Silverman, above n 183, 40.

<sup>185</sup> See *R v Simmonds* (1823) 1 Car & P 84, *R v Bodle* (1833) 6 Car & P 186, *R v Twynings* (1909) 4 QJPR 1 and *R v Thonemann* (1915) 9 QJP 31. These cases are explicable by the lingering traces of the inquisitorial nature of past criminal trials, see *R v Skubevski* [1977] WAR 129 at 139 per Brinsden J.

<sup>186</sup> Newark and Samuels, Ch 8, n 102, 400-401. See also *R v Campbell* (1982) 31 CR (3d) 166 at [13].

<sup>187</sup> Newark and Samuels, Ch 8, n 102, 401.

<sup>188</sup> See *R v Campbell* (1982) 31 CR (3d) 166 at [14] and *R v Badgerow* [2008] CanLII 15894 at [29].

<sup>189</sup> Pattenden, R, *Judicial Discretion and Criminal Litigation* (Oxford, Oxford University Press, 1990) p 104.

<sup>190</sup> See Zander, M, and Henderson, P, *Crown Court Study (Royal Commission on Criminal Justice Research Study No 19)* (London, HMSO, 1993) p 110-111 noting that in 19% of cases the trial judge considered that an “important witness” had not been called by either side.

<sup>191</sup> *R v Finta* [1994] 1 SCR 701 at 861.

call a witness.<sup>192</sup> A greater willingness by judges in England or Australia to exercise the “limited discretion” contemplated by Cory J in *Finta* in order to ameliorate a genuine and manifest unfairness to the accused in an individual case caused by the prosecutor’s refusal to call a particular witness would be justified. Indeed, there is a strong argument that the interests of justice from the perspective of both the prosecution and the defence could be served by a modest extension to the strictly limited discretion presently accorded to judges in both England and Australia to call a witness. As Justice Shepherd has observed extra-curially, “There are some cases, particularly criminal cases, where it is not really fair to the prosecution or the defence to place upon either the burden that inability to impeach credit brings with it.”<sup>193</sup> Justice Shepherd acknowledged that any discretion by the trial judge to call a witness would have to be “exercised sparingly and with great care” but he remained of the opinion “that the power to call a witness, despite the fact that one or both of the parties may object, would be a valuable aid to the doing of justice in some cases.”<sup>194</sup> This view is supported by other commentators.<sup>195</sup> Brown comments that an examination of the Commonwealth authorities suggests that the judge’s role in calling witnesses ranges from a “duty” to do so, to a “wide discretion,” to a “reasonable discretion” to a “narrow discretion.”<sup>196</sup> Brown is critical of the modern proposition that the trial judge should only have a narrow discretion: “The public prosecutor was in historical terms latecomer in criminal trials. There is no justification for such a substantial surrender of responsibility by the judges in calling vital witnesses.”<sup>197</sup>

[10.9.6] The modern position in Australia and England, unlike Canada is that trial judges are very reluctant to call a witness and the power to call witnesses is little used.<sup>198</sup> The High Court in *Apostilides* emphasised that only in the “most exceptional circumstances”<sup>199</sup> should the judge call a witness in a criminal trial. Brown cogently argues that it would be preferable to accord a “reasonable discretion” to the trial judge in this area as opposed to the present “narrow discretion.”<sup>200</sup> It is suggested that the reference to “most exceptional circumstances” stated in *Apostilides* should simply be read as “exceptional circumstances.” This would enable the trial judge in an appropriate case to avoid any manifest unfairness to the defence caused by the prosecutor declining to call a material witness without intruding into either the prosecutor’s broad discretion or the

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<sup>192</sup> See *R v Damic* (1982) 6 A Crim R 35 at 39-49 and *R v S* (1987) 38 CCC (3d) 109. See further Stenning, P, “‘One Blind Man to See Fair Play’: The Judge’s Right to Call Witnesses” (1974) 24 CRNS 49.

<sup>193</sup> Shepherd, Ch 7, n 34, 243. The rules of examination in chief are premised on the basis of calling favourable witnesses whilst the rules of cross-examination are premised on calling unfavourable witnesses, see Curthoys and Kendell, above n 158, 131-132.

<sup>194</sup> *Ibid*, 244.

<sup>195</sup> See Newark and Samuels, Ch 8, n 102, 398-406 (especially 404-406); RCCJ, Ch 2, n 262, at [8.15] and Stenning, above n 192, 49.

<sup>196</sup> Brown, Ch 2, n 220, 378.

<sup>197</sup> *Ibid*.

<sup>198</sup> Pattenden, above n 189, 103.

<sup>199</sup> (1984) 154 CLR 563 at 575. See further the discussion in Chapter 8, n 108.

<sup>200</sup> Brown, Ch 2, n 220, 378.

adversarial character of the criminal trial. Such a modest extension in judicial discretion would be preferable to any strict rule compelling the prosecutor to call the witness.

### **Part 10: Expecting the Defence to Call the Witness: Undermining Basic Principles?**

[10.10.1] A possible objection to the approach in *Cook* is that any expectation that the defence should call a witness undermines both the presumption of innocence and the requirement that the prosecution establish its case beyond reasonable doubt. Though this argument has been most often raised (notably in Australia) in the context of the “expectation” that the defence will call a witness in order to avoid a *Jones v Dunkel* style adverse inference arising from the “failure” to call a witness that they might reasonably have been expected to call, it is not necessarily confined to that situation and has wider application.

[10.10.2] The majority<sup>201</sup> of the High Court in *R v Dyers* was of the view that to allow the jury to draw an adverse inference against the accused from the failure to call a material witness created the expectation that the defence would feel compelled to call the witness in order to avoid the inference. Any such expectation was held to be wrong in principle because the accused is under no obligation of any sort either to give or call evidence.<sup>202</sup> As Callinan J observed:

The principles stated in *Jones v Dunkel* presupposes that there is occasion for the calling of evidence by an accused. Such a presupposition is incompatible both with the presumption of innocence and the right of an accused neither to give nor to call evidence at trial.<sup>203</sup>

[10.10.3] In reaching its decision the majority of the High Court in *Dyers* applied and extended the earlier decisions of the court in *R v RPS*<sup>204</sup> and *R v Azzopardi*.<sup>205</sup> The *ratio* of those cases, as explained by Gaudron and Hayne JJ in *Dyers*, was that it “will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence.”<sup>206</sup> Their Honours noted that the accused is not bound to give evidence and “it is for the prosecution to prove its case beyond reasonable doubt.”<sup>207</sup> A *Jones v Dunkel* style adverse inference is generally impermissible in a criminal trial as “that mode of reasoning depends upon a premise that the person concerned not only could shed light on the subject but also would ordinarily be expected to do so.”<sup>208</sup> Gaudron and Hayne JJ stated that to allow an adverse inference against the accused for his or her failure to call

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<sup>201</sup> Gaudron and Hayne JJ and Callinan J. Kirby J agreed with the reasoning of both Callinan J and Gaudron and Hayne JJ on this point (2002) 210 CLR 285 at 305. McHugh J offered a vigorous dissent.

<sup>202</sup> See the earlier discussion of *R v Dyers* (2002) 210 CLR 285 in Parts 7 and 8 of Chapter 8.

<sup>203</sup> *R v Dyers* (2002) 210 CLR 285 at 328.

<sup>204</sup> (2000) 199 CLR 620.

<sup>205</sup> (2001) 205 CLR 50.

<sup>206</sup> (2002) 210 CLR 285 at 292.

<sup>207</sup> (2002) 210 CLR 285 at 292.

<sup>208</sup> (2002) 210 CLR 285 at 292.

other witnesses similarly gives rise to the impermissible expectation that the accused would call other witnesses:

The reasoning which underpinned the decisions in *RPS* and *Azzopardi* cannot be confined to the accused giving evidence personally. It applies with equal force to the accused calling other persons to give evidence. It cannot be said that it would be expected that the accused would call others to give evidence. To form that expectation denies that it is for the prosecution to prove its case beyond reasonable doubt.<sup>209</sup>

[10.10.4] The clear implication of the majority's reasoning in *Dyers* is that *any* expectation that it is for the defence to call a witness not called by the prosecution, whether to avoid a *Jones v Dunkel* inference or otherwise, is flawed as such an expectation infringes the presumption of innocence and dilutes or even reverses the need for the prosecution to prove its case beyond reasonable doubt. This reasoning is necessarily inconsistent with the view of the Supreme Court in *Cook* that it is for the defence to call a witness discarded by the prosecution. The effect of the majority's reasoning in *Dyers* is far reaching.<sup>210</sup> It suggests that it is for the prosecution to call any material witness, even if he or she is unfavourable to the prosecution case, and to expect the defence to call any witness undermines basic principles.

[10.10.5] This reasoning and that of the earlier analogous cases of *R v RPS*<sup>211</sup> and *R v Azzopardi*<sup>212</sup> is not without its defenders.<sup>213</sup> Eakin, for example, argues that to assume the accused will give or call evidence "is an assumption that effectively amounts to a rejection of the presumption of the innocence and a shifting of the burden onto the accused."<sup>214</sup> Eakin praises the High Court<sup>215</sup> for proving itself to be the "guardian of the golden thread."<sup>216</sup> Whilst, like Biber in her critical commentary of *Dyers*,<sup>217</sup> I do not challenge the importance of such vital prescripts as the right of the accused to silence, the presumption of innocence and the prosecution bearing the burden of proof, I do question the reasoning and conclusion reached by the majority in *Dyers*. There are a number of powerful arguments of both principle and practice that can be advanced against the reasoning employed by the majority.

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<sup>209</sup> (2002) 210 CLR 285 at 292.

<sup>210</sup> See the earlier discussion in Part 8 of Chapter 8.

<sup>211</sup> (2000) 199 CLR 620.

<sup>212</sup> (2001) 205 CLR 50.

<sup>213</sup> See Papamatheos, Ch 8, n 225, 31-32. See also Harvey, D, "The Right to Silence and the Presumption of Innocence" [1995] NZLR 181 at 181 and Bagaric, M, "The Diminishing Right of Silence" (1997) 19 U Syd L Rev 366 at 366.

<sup>214</sup> Eakin, C, "*RPS v R*: The Resilience of the Accused's Right to Silence" (2000) 22 U Syd L Rev 669 at 680.

<sup>215</sup> See also *R v RPS* (2000) 199 CLR 620. cf *R v Weissensteiner* (1993) 178 CLR 217.

<sup>216</sup> Eakin, above n 214, 680.

<sup>217</sup> Biber, K, "On Not Speaking: The Right to silence, the gagged trial judge and the spectre of child sexual abuse" (2005) 30 Alt LJ 19 at 23.

[10.10.6] The line of reasoning of the majority in *Dyers* has been the subject of strong academic criticism as “bogus”<sup>218</sup> or “illogical and confusing.”<sup>219</sup> It was the subject of a vigorous dissent by McHugh J<sup>220</sup> and the arguments accepted by the majority have not been adopted in other jurisdictions such as England,<sup>221</sup> New Zealand,<sup>222</sup> the United States,<sup>223</sup> or Canada,<sup>224</sup> notably in the unanimous decision of the Supreme Court in *R v Jolivet*.<sup>225</sup> In particular the arguments accepted by the majority in *Dyers* have been conspicuous in Canada by their absence and were not raised in *Cook* by either defence counsel in their submissions to the Supreme Court or by the court in its own comprehensive consideration. It has been widely accepted outside Australia that leaving or expecting the defence to call a witness leaves basic principles intact. The accused is still entitled to the presumption of innocence and the prosecution must still prove its case beyond reasonable doubt.<sup>226</sup> The accused is not compelled to give nor call evidence.<sup>227</sup> The accused is perfectly entitled to remain silent and insist that the prosecution prove its case.<sup>228</sup>

[10.10.8] Even accepting that it is wrong to draw an adverse inference from the accused’s failure to call a material witness,<sup>229</sup> given the strong criticisms of *Dyers*, I would suggest the majority’s reasoning should not be extended beyond the drawing of an adverse inference for a failure to call a witness and read as a requirement that the prosecution

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<sup>218</sup> Smith, J, “Commentary [to *R v Wright*]” [2000] Crim LR 510 at 510-511. The Court of Appeal in *R v Khan* [2001] EWCA Crim 486 at [19] accepted the “logical force” of Smith’s arguments.

<sup>219</sup> Hamer, D, “The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part 1” (2004) 28 Crim LJ 160 at 161. See also Williams, C, “Silence in Australia: Probative Force and Rights in the Law of Evidence” (1994) 110 Law Q Rev 629 at 637.

<sup>220</sup> (2002) 210 CLR 285 at 301-302.

<sup>221</sup> See *R v Bryant & Dickson* (1946) 31 Cr App R 151 at 153, *R v Gallagher* [1974] 1 WLR 1204, *R v Wilmot* (1988) 89 Cr App R 341, *R v Couzens & Frankel* [1992] Crim LR 822, *R v Khan* [2001] EWCA Crim 486 and *R v Campbell* [2009] All ER (D) 119. cf *R v Wheeler* [1967] 3 All ER 829 at 830 and *R v Wright* [2000] Crim LR 510.

<sup>222</sup> See *Trompert v Police* [1985] 1 NZLR 357. This is notwithstanding the passage of the *Bill of Rights Act* 1990, see *R v Gunthorp* [2006] 3 NZLR 433 at [142]-[143].

<sup>223</sup> *United States v Caccia* (1997) 122 F 3d 136 at [20]. See also *Francis v Franklin* (1970) 471 US 307 at 314.

<sup>224</sup> See *R v Zehr* (1981) 54 CCC (2d) 65 at 68-69, *R v Koffman* (1985) 20 CCC (3d) 232 at 237-238, *R v Rooke* (1988) 40 CCC (3d) 484 at 517-518. This principle has been accepted and applied, both before (see *R v Charette* (1982) 67 CCC (2d) 357, *R v Bolianatz* (1987) 20 BCLR (2d) 304 and *R v Sanchez-Ruiz* (1991) 68 CCC (3d) 500) and after the introduction of the *Charter of Rights* (see *R v S* (1998) 133 CCC (3d) 559 and *R v Marshall* (2005) 200 CCC (3d) 179).

<sup>225</sup> (2000) 144 CCC (3d) 97 at 110-111 and 113-114.

<sup>226</sup> *R v Jolivet* (2000) 144 CCC (3d) 97 at 112 and *R v Dyers* (2002) 285 at 301-302 per McHugh J.

<sup>227</sup> Rather “it is just that that choice [not to give or call evidence] may have certain consequences,” Hamer, above n 219, 161. See also *R v Weissensteiner* (1993) 178 CLR 217 at 229, *Haw Tua Tau v Public Prosecutor* [1982] AC 136 at 155 and Williams, above n 219, 637.

<sup>228</sup> *R v Jolivet* (2000) 144 CCC (3d) 97 at 112 and *R v Dyers* (2002) 285 at 301-302 per McHugh J.

<sup>229</sup> The wisdom of discarding the rule in *Jones v Dunkel* is far from obvious. The rule is firmly established in the criminal law, see *R v Jolivet* (2000) 144 CCC (3d) 97 at 110. Indeed, the rule can be traced back as far as *Blatch v Archer* (1774) 1 Cowp 63 at 65 (see also *R v Burdett* (1820) 4 B & Ald 95 at 123). The High Court in *R v Weissensteiner* also noted that the rule “has never really been doubted” (1993) 178 CLR 217 at 227. McHugh J in *Dyers* was strongly critical of the majority’s decision to discard the rule, “They pronounce as heresy a principle that criminal lawyers have preached for nearly 200 years” (2002) 210 CLR 285 at 298.

must call all relevant witnesses. It would be inappropriate to extend *Dyers* to the notion that the prosecution must call any relevant witness as it would infringe basic principles to ever expect the defence to call a witness. The result of the reasoning of the majority in *Dyers* if applied to its logical extent would result in the prosecution having to call virtually every relevant witness, no matter how damaging their evidence was to the prosecution case or how closely aligned with the defence “camp” they might be. *Dyers* is an obvious example of this. As was forcibly pointed out by McHugh J, it is “natural to suppose” that the jury would reasonably think that it is for the accused to call an alibi witness.<sup>230</sup> An alibi witness is the “paradigm” of where it is only natural to expect the accused to call the witness.<sup>231</sup> It is absurd to suggest that the prosecution’s “duty” to call witnesses could extend to an obligation to call any possible alibi witness. Such a notion confuses the roles of prosecution and defence counsel.

[10.10.9] The majority’s reasoning in *Dyers* also does not withstand close scrutiny from a practical viewpoint. In effect in the *Dyers* situation the defence are using the prosecution as a vehicle to obtain the testimony of the witness that they wish to adduce without having to call the witness. If the prosecution calls a witness helpful or sympathetic to the defence case, they are not compelled (in fact far from it) to elicit the unhelpful (to the prosecution) evidence from the witness in examination-in-chief and then to present the witness to the jury as a reliable or credible witness of truth. As was noted in *R v Le*,<sup>232</sup> “The obligation to call a witness does not create an obligation to embrace and accept whatever the witness says.”<sup>233</sup> Similarly, the prosecution is not required to elicit any evidence from the witness. The prosecution is entitled simply to tender the witness for cross-examination and to leave it to the defence to elicit the testimony that it wishes from the witness.<sup>234</sup> Alternatively, it is “well settled” that the prosecution can submit, even if the witness is not declared hostile, that the court should prefer the account of one of its witnesses to that of another and leave it to the court to draw its own conclusion.<sup>235</sup>

[10.10.10] What does it matter who calls the witness if ultimately it is the defence who will elicit the evidence supporting its case from the witness? Does it really matter whether the evidence is adduced through the defence cross-examination of the witness if called by the prosecution or by the defence adducing the evidence in examination-in-chief if the witness is called by the defence? The defence may not have a right at common law to cross-examine the witness unless he or she is declared hostile but this consideration

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<sup>230</sup> (2002) 210 CLR 285 at 299.

<sup>231</sup> (2002) 210 CLR 285 at 299. See also Smith, above n 218, 510-511.

<sup>232</sup> (2002) 130 A Crim R 44.

<sup>233</sup> (2002) 130 A Crim R 44 at [68].

<sup>234</sup> See, for example, *R v Apostilides* (1984) 154 CLR 563 at 576 and *R v Lobbon* [1995] 2 All ER 602. This accords with historical practice, see Chapter 7, n 98.

<sup>235</sup> *Graham v Police* (2001) 122 A Crim R 152 at 165. See also, *R v Brent* [1973] Crim LR 275 (see the previous discussion in Chapter 9 at [9.4.10]), *R v Walden* (1977) 16 SASR 421 at 427, 435 and 442-443, *R v Vollmer* [1996] 1 VR 95 at 139, *R v Goncalves* (1997) 99 A Crim R 193 at 216 and *R v Colquhoun* [2009] SASC 138 at [22]. The position in NSW is different (see *R v Kennedy* (2000) 118 A Crim R 34 and *R v Teasdale* (2004) 145 A Crim R 345) but these cases are explicable by s 38 of the *Uniform Evidence Act* and haven’t been followed outside the UEA jurisdictions (see *R v Macfie (No 2)* (2004) 11 VR 215 at [51] and *R v Andrews* [2010] SASC 5 at [65], [87] and [145]).

does not dictate the need for a duty for the Crown to call any relevant witness.<sup>236</sup> No one has seriously suggested that the prosecution’s obligation, even as a minister of justice, extends to not only calling the witness but eliciting on the defendant’s behalf the favourable testimony that the defence wish to lead. Such a proposition would wholly undermine the adversarial nature of the prosecutor’s role. Even the reasoning of the majority in *Dyers* does not extend to asserting that the presumption of innocence would be infringed if prosecution counsel called an unhelpful witness but either tendered the witness for cross-examination and declined to ask any questions and/or failed to present the witness as a reliable witness of truth to the jury and left it to defence counsel to undertake these tasks. It is therefore difficult to see how basic principles are undermined by requiring the defence to call a witness not called by the prosecution.

[10.10.11] It is also relevant to consider the effect on any duty in calling witnesses of s 38 of the *Uniform Evidence Acts* in the Australian jurisdictions that apply it.<sup>237</sup> Though a detailed scrutiny of the operation of s 38 is beyond the province of this Thesis,<sup>238</sup> the provision “drastically” alters the common law in respect of hostile witnesses.<sup>239</sup> The section allows a party to impugn and cross-examine a witness called by them if the evidence of the witness is “unfavourable,”<sup>240</sup> the witness has made no “genuine attempt to give evidence” on a matter which the witness may reasonably be supposed to have knowledge<sup>241</sup> or the witness at any time has made a prior inconsistent statement.<sup>242</sup> The section has a “broad” operation in practice.<sup>243</sup> It represents a marked departure from the restrictions that existed at common law and allows a party to impugn and cross-examine a witness called by them without that witness being declared hostile.<sup>244</sup> The provision also allows a potentially hostile witness to be called without infringing the common law rule that it is “improper” to call a witness likely to be hostile simply to place before the jury a prior inconsistent statement which goes only to credit and is inadmissible to prove the facts stated in it.<sup>245</sup>

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<sup>236</sup> See the previous discussion in Part 7 of this Chapter.

<sup>237</sup> The Australian Capital Territory, the Commonwealth, New South Wales, Tasmania and Victoria.

<sup>238</sup> For a detailed study of the provision see, Anderson, J, Williams, N, and Clegg, L, *The New Law of Evidence: Annotation and Commentary on the Uniform Evidence Acts (2<sup>nd</sup> ed)* (Chatswood, LexisNexis Butterworths, 2008) p 101-114.

<sup>239</sup> *Ibid*, 101.

<sup>240</sup> This term has been given a wide meaning. It does not mean “hostile” or “adverse” but simply “not favourable,” see *R v Souleyman* (1996) 40 NSWLR 712 at 715. See further Anderson *et al*, above n 238, 107.

<sup>241</sup> This term has also been given a wide meaning and lack of co-operation rather than untruthfulness will suffice, see *R v Saunders* (2004) 149 A Crim R 174 at [65]. See further Anderson *et al*, above n 238, 108.

<sup>242</sup> See *Ibid*, 108-109 as to the wide operation of this part of the provision as well.

<sup>243</sup> *DPP v Nair* (2009) 236 FLR 239 at 246.

<sup>244</sup> Anderson *et al*, above n 238, 102. The term “hostile” is narrowly defined at common law. The court “must form the view that the witness was deliberately withholding or lying about material evidence” (*Ibid*). See also *McLennan v Boyer* (1961) 106 CLR 95 and *R v Hutchinson* (1988-1990) 53 SASR 587 at 592.

<sup>245</sup> See *R v Adam* (2001) 207 CLR 96. For the common law position, see *R v Thompson* [1964] QWN 25, *R v Blewitt* (1988) 80 ALR 353 and Munday, Ch 9, n 29, 866-873.



[10.10.12] There have been suggestions that the wider power of cross-examination afforded by s 38 reinforces the prosecutor's minister of justice role in calling all material witnesses.<sup>246</sup> Indeed, one recent textbook has even gone as far as to suggest:

The prosecutorial obligation to call all relevant witnesses, combined with the effect of s 38, may have developed into a new, positive obligation upon the prosecution to not only call all relevant witnesses, but also to make an application under s 38 to cross-examine any witness to whose evidence s 38 potentially applies.<sup>247</sup>

[10.10.13] This proposition is far reaching. The notion that prosecution counsel may not only have to call all material witnesses regardless of their value to the prosecution case and sympathy to the defence and may also then be compelled to use s 38 to impugn and cross-examine such witnesses is bizarre. It appears far removed from the adversarial nature of the criminal trial and the hitherto well understood roles of prosecution and defence in that adversarial process to select their own witnesses and present their own case as they see fit.<sup>248</sup> I would suggest that is convoluted and unnecessary to employ s 38 to reinforce the "minister of justice" duty in calling witnesses. Rather than insisting on the prosecutor calling unhelpful or unfriendly witnesses as part of its case, only to then impugn them under s 38, it would be a simpler solution and more consistent with the adversarial nature of the criminal trial and the respective roles of prosecution and defence for the defence to call such witnesses. If the witness proves unwilling to give the evidence sought by the defence in examination-in-chief, s 38 is available to enable the defence to impugn or cross-examine him or her. In this way the defence may also achieve its objective of cross-examining the witness. The procedure enables the defence to call and cross-examine either a witness helpful to their case who "fails to come up to proof" or a witness unhelpful to their case who the prosecution decline to call but who the defence for tactical reasons wish to call to attack the prosecution case or the credibility of a prosecution witness.<sup>249</sup>

[10.10.14] It has been noted that s 38 has the potential to transform the traditional procedure of criminal trials.<sup>250</sup> I would suggest that the provision should be employed, not to transform the criminal trial in favour of an even stricter and more impracticable obligation on the prosecution to call unhelpful or unnecessary witnesses, but rather to support the proposition advanced in *Cook* that once full disclosure has been made it should be for the defence to call witnesses discounted by the prosecution in its broad discretion. In this sense s 38 supports the adversarial approach in calling witnesses and clearly has the potential to transform the operation of criminal trials.

[10.10.15] Whether in the context of avoiding a *Jones v Dunkel* direction or in a general sense of a witness not called by the prosecution in the exercise of its broad discretion, it is my argument that to expect the defence to call the witness does not undermine basic principles in the manner asserted by the majority in *Dyers*. It neither undermines the

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<sup>246</sup> *R v Kanaan* [2006] NSWCCA 109 at [84]. See also Anderson *et al*, above n 238, 102.

<sup>247</sup> *Ibid*.

<sup>248</sup> *R v Ratten* (1974) 131 CLR 510 at 517 and *R v Libke* (2007) 81 ALJR 1309 at 1325. See also [7.1.8]

<sup>249</sup> See, for example, *R v Roberts* (1984) 80 Cr App R 89 and *R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828. See further the discussion in Part 1 of Chapter 7 at [7.1.11]-[7.1.13].

<sup>250</sup> *R v Kanaan* [2006] NSWCCA 109 at [84].

presumption of innocence nor dilutes the burden of proof. It is in accordance with both “ordinary logic and experience”<sup>251</sup> in a modern adversarial system where full disclosure has been made to the defence to expect it to call a witness that it wishes to testify who is not be called by the prosecution. There is no persuasive argument of principle or practice against such a proposition. Ultimately, as Binnie J declares, “In general witnesses should be called by the party that wants their evidence.”<sup>252</sup>

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<sup>251</sup> *R v Jolivet* (2000) 144 CCC (3d) 97 at 110.

<sup>252</sup> *R v Jolivet* (2000) 144 CCC (3d) 97 at 106.

# CHAPTER 11

## CONCLUSION

### TYING THE LOOSE ENDS

*The complex role of the modern prosecutor does not lend itself to a simple definition that is capable of universal application. The minister of justice concept, whilst of value in some contexts, should be discarded in others. It is argued that the “Canadian solution” to the issues of disclosure and calling witnesses represents a fair and effective way forward and accords with precedent, principle, and practice. Once the prosecutor has made full disclosure of any relevant material he or she should have a broad discretion in the choice of witnesses. It should generally be for the defence to call any witness discarded by the prosecution. It is my argument that this approach should also be adopted in Australia. Though the prosecutor should never act in a vindictive or unethical manner, he or she should be free in some circumstances and with regard to some functions to adopt the role of the adversarial advocate. Justice in a modern adversarial criminal system is not served by supine prosecutors.*

#### **Part 1: The Prosecutor’s Complementary Roles with Respect to Disclosure and Calling Witnesses**

[11.1.1] *Cook* is a landmark decision in the areas of both disclosure and calling witnesses. It has finally resolved, in Canada at least, the “ancient conflict”<sup>1</sup> as to what role the

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<sup>1</sup> *R v Mullen* [1980] NIJB 10.

prosecutor should adopt in the selection of witnesses. *Cook* is “emphatic” that the minister of justice view of the prosecutor’s role in calling witnesses regardless of their truthfulness, desire to testify or ultimate effect on the trial “should be put to rest forever.”<sup>2</sup> However, *Cook* not only supports the prosecutor’s adversarial role in calling witnesses, but also provides a compelling rationale for this role and explains how it is consistent with adversarial practice and the right to a fair trial. This approach has been applied in subsequent Canadian cases.<sup>3</sup> It is notable that there does not appear to have been any significant criticism, or even misgivings, of the approach taken by the Supreme Court in *Cook*.

[11.1.2] The settled position in Canada therefore is that the prosecutor in relation to questions of disclosure, as in Australia or England, is subject to a formal duty to act as the minister of justice. However, in relation to its choice of witnesses at trial the prosecution possesses a broad discretion and in the absence of an “abuse of process” is at liberty to present its case at trial as it wishes. There is no duty on the prosecution to call all the witnesses in the case, whether named on the back of the indictment, material to the issues in the case, or essential to the narrative. If the prosecutor fails to call a significant, or even crucial, witness then it may risk an adverse inference being drawn, or leave a gap in the case against the accused, which might lead to an acquittal, but it remains a tactical decision for the prosecutor, and the prosecutor alone. It is my argument that such a wide prosecutorial discretion is desirable in the context of the adversarial criminal justice process. The prosecutor’s obligation to act fairly is satisfied by full disclosure of any relevant material to the accused. The defence will know of any relevant unused material in the prosecution’s possession, and will therefore be in an informed position to decide whom they wish to call at trial. If the defence wish a witness to testify, whether for tactical reasons or otherwise, then the remedy is not to ask the prosecutor to call that witness, but rather for the defence to call that witness. As was noted in *R v Franks*,<sup>4</sup> “The prosecutor is not obliged to discharge the functions and responsibilities of defence counsel.”<sup>5</sup>

[11.1.3] The Canadian position represents what the law should be in relation to both the areas of disclosure and calling witnesses and reflects the sound legal and policy considerations behind such a view. Why Canada, rather than Australia or England, has arrived at what I contend is a reconciliation in the law, of the longstanding tension in the prosecutorial roles of adversarial advocate and minister of justice, in relation to disclosure and calling witnesses, is not entirely clear.<sup>6</sup>

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<sup>2</sup> *R v Passley* (2003) 176 Man R (2d) 53 at [12].

<sup>3</sup> See, for example, *R v S(E)* (2000) 129 OAC 146, *R v Jolivet* (2000) 144 CCC (3d) 97 at 106-107, *R v T (GJ)* (2000) 603 APR 71, *R v Passley* (2003) 176 Man R (2d) 53, *R v P(L)* (2003) 172 CCC (3d) 195, *R v Jackson* (2005) 202 CCC (3d) 228 and *R v Grant* [2007] 4 WWR 543.

<sup>4</sup> (1991) 67 CCC 280. Authors such as Moisisdis, Ch 1, n 33, 139, suggest that this proposition could be reinforced by a requirement for mandated defence disclosure. However, such requirements when attempted in either England or Australia have proved highly problematic in practice and are not a “magic solution” to this issue. See further the previous discussion in Part 6 of Chapter 6 at [6.7.8]-[6.7.9], especially Chapter 6, n 147.

<sup>5</sup> (1991) 67 CCC 280 at 284.

<sup>6</sup> The introduction of the *Charter of Rights* in Canada in 1982 led to an avalanche of litigation that challenged and tested virtually every aspect of the Canadian criminal process, see McDermott, P, “The Legal Framework of the

[11.1.4] There are, as discussed in Chapter 10, a number of objections to recognition of the prosecutor's adversarial role in calling witnesses. It may be argued that a broad discretion in calling witnesses deprives the accused of the right to cross-examine a witness and the right (where it applies) of last address to the jury; that this may result in unfairness to the accused by compelling him or her to call a witness who is hostile to his or her cause and that it undermines the presumption of innocence, or the prosecution's burden to prove its case beyond reasonable doubt. These objections were either dismissed or not raised in *Cook*. The Supreme Court asserted that, rather than emasculating the adversarial nature of the criminal trial and the prosecutor's function within it, alternative remedies could be employed to alleviate any *unfair* prejudice to the accused. The remedies suggested by the Supreme Court in *Cook*, especially a greater judicial willingness to call a witness, would alleviate at least some of the unfair prejudice that may be occasioned to the accused. In the *Uniform Evidence Act* jurisdictions in Australia the greater use of s 38 of the Act by the defence will further alleviate any prejudice to the accused.<sup>7</sup> Indeed, s 38 places the accused in the very position that he or she wants, of being able to cross-examine any unfavourable witness he or she calls. It is acknowledged that some of the potential arguments against the prosecutor's adversarial role in calling witnesses, especially the possible prejudice from the loss of cross-examination of an unsympathetic witness, are valid. However, such arguments do not support or compel imposition of the minister of justice obligation on the prosecution to call at trial any material witness regardless of their truthfulness, desire to testify or benefit to the prosecution case.

[11.1.5] The minister of justice role of the prosecutor in the calling of witnesses, as discussed in Chapter 9, still lingers in England, at least in theory if not always in practice. *Oliva* has not yet been formally overruled. However, it is apparent that a close scrutiny of some of the modern English decisions on the issue reveals at least a significant extension of the prosecutor's discretion not to call a material witness, though perhaps not quite yet a formal acceptance of the prosecutor's adversarial role. It would now appear, in England, that in practice any obligation on the part of the prosecution to call witnesses at trial does not extend to calling witnesses who are helpful to the defence case or harmful to the prosecution case. Any defence complaint that the absence of the testimony of that witness might prejudice the case of the accused can, and is now in practice, resolved by the prosecution's comprehensive duty of disclosure. As was suggested by the Court of Appeal in *Balmforth*<sup>8</sup> and *Richardson*,<sup>9</sup> the prosecution must serve the evidence of a witness that they do not wish to call as part of the unused material. This is not a novel or radical suggestion. Indeed, it was foreshadowed in earlier cases such as *Nicholson*,<sup>10</sup> *Lemay*,<sup>11</sup>

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Criminal Law" in O'Mahony, P, (ed) *Criminal Justice in Ireland* (Dublin, Institute of Public Administration, 2002), p 14. "As a result of this litigation under the *Charter*, Canada now has a highly developed and sophisticated criminal law jurisprudence", *Ibid*, 15.

<sup>7</sup> See the discussion in Part 10 of Chapter 10 at [10.10.11]-[10.10.14].

<sup>8</sup> *R v Balmforth* [1992] Crim LR 825.

<sup>9</sup> *R v Richardson* (1994) 98 Cr App R 174.

<sup>10</sup> *R v Nicholson* (1936) 100 JPN 553.

<sup>11</sup> *R v Lemay* [1952] 1 SCR 232 at 242

*Brent*<sup>12</sup> and even by Deane J in *Whitehorn*<sup>13</sup> that the prosecution might choose to discharge any “duty” in calling witnesses by supplying the accounts of those witnesses to the defence.

[11.1.6] A witness “served” as unused material need not be listed on the back of the indictment. It is then an issue for the defence whether to call that witness. The defence will know of the identity and evidence of that witness and the comprehensive system of pre-trial case management that exists in England (though not to the same extent in Australia) provides ample opportunity for the defence, before trial, to be fully aware of whom the prosecution will call, and to arrange the attendance of a witness the prosecution won’t call, if the defence so wish. It would appear that, although *Oliva* may ostensibly represent the law, in practice in England, unlike Australia, the duty of disclosure has eroded the restraints on the prosecution in its selection of witnesses. Providing satisfactory disclosure has made it accepted practice for the prosecution to discard an unused witness and to leave it to the defence to call that witness.

[11.1.7] Australia has yet to accept or realise that the rationale for the prosecutor’s minister of justice role in relation to the calling of witnesses has now been undermined by the final confirmation of the prosecutor’s duty of disclosure in the decision of the High Court in *Mallard*. It is my argument that *Mallard* justifies a fundamental reconsideration of the prosecution’s minister of justice role in the choice of witnesses. *Mallard* supports a return to the adversarial approach in calling witnesses, which was generally recognised by the Australian courts until the early 1980s.<sup>14</sup>

[11.1.8] It may also be argued that it is unfair, given the continuing disparity in the resources between the prosecution and the defence,<sup>15</sup> to place the burden on the defence of calling witnesses that the prosecution are unwilling to call, even if the prosecution has complied with its modern duty of disclosure and has provided to the defence the details of the witnesses it is not calling, as well as the evidence of such witnesses. This contention is not persuasive. The task of calling a witness is not as onerous or demanding as the prosecution’s modern duties of disclosure (even accepting that the prosecution’s duties do not extend to third party material that might be of assistance to the defence). In an adversarial system of criminal justice it is both proper in principle and practice to expect the defence to call its own witnesses, including any that the prosecution might have served as unused material. If requiring the defence to call additional witnesses did place a significant additional burden upon the defence, it is misconceived to seek to redress that problem by compelling the prosecution to call all the material witnesses in the case. Such an argument had substance in the 1800s when the accused was in a disadvantaged position in comparison to the prosecution, but such an argument carries less weight in the modern age. If the defence lack the resources to call additional witnesses, then the answer lies not in imposing a duty upon the prosecution to call those witnesses but rather in the appropriate authorities ensuring that the defence are sufficiently resourced to be able to carry out this task. As Smith LJ asserted in *Gleadhill v Huddersfield*

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<sup>12</sup> *R v Brent* [1973] Crim LR 275.

<sup>13</sup> *R v Whitehorn* (1983) 152 CLR 657 at 664.

<sup>14</sup> See the discussion in Part 10 of Chapter 7 and Part 3 of Chapter 8.

<sup>15</sup> See, for example, Zacharias, Ch 4, n 9, 79-81. See further the discussion in Part 9 of Chapter 5 at [5.9.2].

*Magistrates Court*,<sup>16</sup> arguments about the additional burden imposed by the modern duty of disclosure did not deter the court's imposition of such a duty. If the interests of justice require that resources are necessary for a particular purpose, then such resources must be found and if this causes difficulty and expense, then that prospect must be borne with fortitude.<sup>17</sup>

[11.1.9] It is acknowledged that there may be exceptions to the prosecution adopting a purely adversarial role in calling witnesses. In some circumstances it may be appropriate for the prosecution to secure the attendance at trial of a witness who is named on the back of the indictment, who they no longer wish to call in accordance with the practice in *Cassidy*, in the event the defence might wish to call him or her. This is because, as was acknowledged in *Cassidy*, the defence might not make the necessary arrangements to call such a witness and might reasonably assume that the prosecution are intending to call any witness named on the back of the indictment.<sup>18</sup> It may also be appropriate, as was suggested in Chapter 4,<sup>19</sup> where an accused is legally unrepresented, for the prosecution to dilute its adversarial approach, and call a witness whom it may otherwise have been reluctant to call. There may be circumstances where it would be "manifestly unfair" for the defence to be required to call a witness.<sup>20</sup> For example, as was suggested in *Ziems* and *Haringey Justices*, there is a policy argument that a serving police officer might be better called by the prosecution than the defence.

[11.1.10] However, in most other circumstances the prosecution's obligations should be confined to dealing with its demanding duties of disclosure. Once the necessary information has been provided to the defence, it is for the defence, and not the prosecution, to call any material witness that the prosecution in its broad discretion has decided not to call. In the absence of either a genuine abuse of process or some other special situation,<sup>21</sup> the prosecution should be at liberty to prove its case as it sees fit.

[11.1.11] It is not unusual for defence efforts to insist on the prosecution calling a witness to be motivated by questionable tactical factors, most notably a desire to attack the prosecution case or the credibility of a prosecution witness without requiring the accused to testify and exposing him or her to the risk of cross-examination.<sup>22</sup> Such a tactical motivation, far from supporting any notion of compelling the prosecution to call all material witnesses, supports the prosecutor's adversarial role in this area. It is not for the prosecution to call witnesses in order to undermine its own case and present the defence

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<sup>16</sup> [2005] EWHC Admin 2283.

<sup>17</sup> [2005] EWHC Admin 2283 at [31]. See further the discussion in Part 8 of Chapter 6 at [6.8.7].

<sup>18</sup> See Hinton, Ch 7, n 12, 263-264, n 15. Though in practice with the comprehensive pre-trial case management systems now existing, notably in England, one would expect this issue to be identified and resolved well before trial.

<sup>19</sup> See the discussion in Part 11 of Chapter 4 at [4.11.8].

<sup>20</sup> See *R v Passley* (2003) 176 Man R (2d) 53 at [19]. See also *R v H (J)* (1996) 16 OTC 69.

<sup>21</sup> See *R v Passley* (2003) 176 Man R (2d) 53 and *R v G* [2007] CanLii 20675.

<sup>22</sup> See, for example, *R v Roberts* (1984) 80 Cr App R 89 (see the discussion in Part 4 of Chapter 9), *R v Jamieson* (1992) 60 A Crim R 68 (see further Chapter 8, n 133), *R v Jolivet* (2000) 144 CCC (3d) 97 at 105-106, *R v Bradish & Hall* [2004] EWCA Crim 1340 (see further Chapter 9, n 255) and *DPP v Jensen* [2007] VSC 77 at [21] (see further Chapter 8, n 213).

with an opportunity to attack the credit of other prosecution witnesses. “No sensible rule of justice could require such a stance to be taken.”<sup>23</sup> Vanstone J in the recent decision of *R v Andrews*<sup>24</sup> pointed to the dangers of the prosecution being compelled to call witnesses closely aligned or sympathetic to the defence case:

An insistence by defence counsel that a particular witness be called by the prosecution could lead to unfavourable evidence being neither the subject of cross-examination nor of adverse comment. By such a turn of events the adversarial role of Crown counsel would be emasculated in a way contrary to the interests of justice.<sup>25</sup>

[11.1.12] Even before *Cook*, in *R v Dell*<sup>26</sup> Connor Prov J “drew together the threads” and explained how the evolution of the prosecution’s duty of disclosure would relate to the calling of witnesses at trial:

...the Crown may discharge its obligation to act fairly by making full disclosure to the accused. The effect of *Stinchcombe* and *Franks* is to better delineate the respective roles of Crown and defence counsel. Crown counsel is left to prosecute his or her case by adducing such evidence as in the opinion of the Crown is necessary to establish the case for the Crown. Defence counsel, armed with the information disclosed by the Crown, will be better able to assist the accused make full answer and defence. Each side will call those witnesses, which respective counsel deem necessary to their case. The Crown will not be burdened with calling witnesses which may be adverse in interest or which tend to refute the Crown’s case or otherwise support the defence. Counsel will test the evidence of the other party’s witnesses and as Mr Cutler [prosecution counsel] submitted, the cross-examination and testing of the witnesses’ evidence is more effective when done by counsel who represent a party to the proceedings who may be adverse in interest to the witness. This is as it should be in an adversarial system of criminal justice. But it bears repeating that the Crown is still obliged to act fairly and without oblique motive. Our system of criminal justice and ultimately society will be the beneficiaries of the clarification of Crown counsel’s duties and the respective roles of Crown and defence counsel.<sup>27</sup>

[11.1.13] The Canadian approach reduces the longstanding tension between the contrasting duties of the prosecutor as both a minister of justice and adversarial advocate to the questions of disclosure and the prosecution’s choice of witnesses. The Canadian approach would appear to achieve the difficult task of rendering these roles compatible and consistent. As Rand J noted in *R v Lemay*, “The duty of the prosecutor to see that no unfairness is done to the accused is entirely compatible with [its] discretion as to witnesses.”<sup>28</sup> In considering what should be the proper role of the modern prosecutor it is significant to note that justice should be for all the players in the criminal process: victims, witnesses, and the community, as well as the defendant. It is my contention that the Canadian solution to the twin issues of disclosure and calling witnesses achieves just that. It was applied as early as 1936 in *R v Nicholson* and has now been embraced in part

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<sup>23</sup> *R v Russell-Jones* [1995] 3 All ER 239 at 244. See also [9.8.3].

<sup>24</sup> [2010] SASCFC 5.

<sup>25</sup> [2010] SASCFC 5 at [84].

<sup>26</sup> [1994] 4 WWR 313.

<sup>27</sup> [1994] 4 WWR 313 at [106] – [108].

<sup>28</sup> [1952] 1 SCR 232 at 242.



in England.<sup>29</sup> With the confirmation in *Mallard* of the prosecutor's modern duty of comprehensive disclosure there are no compelling reasons against the adoption in Australia of the Canadian solution. *Cook* should also be embraced in Australia.

## **Part 2: The Prosecutor's Modern Role: "To Become a Lawyer for the People"?**

[11.2.1] As Mitchell observes, "It is trite to observe that 'Crown counsel's role within the criminal justice system is unique'." <sup>30</sup> The prosecutor plays a fundamental, though often overlooked and misunderstood role in the criminal process. The question of how the prosecutor should discharge his or her many functions and powers within a demanding and modern adversarial criminal process is neither simple nor straightforward. As McNair notes there is no single document which sets out the role of the prosecuting lawyer.<sup>31</sup> "It is a role circumscribed by statute, case law, professional conduct, history, custom and practice."<sup>32</sup>

[11.2.2] A former Lord Chancellor declared of the prosecutor's role, "Prosecuting counsel is not an avenging angel, he is an instrument of justice."<sup>33</sup> However, this concept is open to criticism.<sup>34</sup> More than "general platitudes"<sup>35</sup> or a "glib phrase"<sup>36</sup> or a "pretty phrase"<sup>37</sup> is required to define and govern the modern prosecutorial role adequately.<sup>38</sup> As Zacharias contends, the "special prosecutorial duty is worded so vaguely, that it obviously requires further explanation... [it provides] remarkably little guidance on its meaning."<sup>39</sup>

[11.2.3] "The inherent richness and complexity of the prosecution's role"<sup>40</sup> in a modern adversarial criminal process is such that there is no simple formula of general application that is capable of governing the prosecutorial role. It is acknowledged that in the context of the emergence over recent years towards therapeutic justice and specialised "problem solving" courts that a partisan and "adversarial" prosecutorial approach may well be unhelpful and inappropriate in such courts.<sup>41</sup> It is also accepted that, as was discussed in Chapter 4, in some circumstances and with respect to some prosecutorial functions, the minister of justice concept, remains valid. It is argued that, as made clear in Chapters 5

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<sup>29</sup> See the discussion in Part 11 of Chapter 9.

<sup>30</sup> Mitchell, Ch 4, n 9, 495, quoting *R v Henderson* (1999) 44 OR (3d) 628 at 638.

<sup>31</sup> MacNair, Ch 1, n 41, 287.

<sup>32</sup> *Ibid.*

<sup>33</sup> Lord Mackay LC quoted by Fionda, Ch 1, n 201, 47.

<sup>34</sup> See, for example, Zacharias, Ch 4, n 9, 46-47. See further the discussion in Part 11 of Chapter 4 at [4.11.1].

<sup>35</sup> MacNair, Ch 1, n 41, 258. See also Fisher, Ch 4, n 8, 201.

<sup>36</sup> Ashworth and Blake, Ch 1, n 55, 31.

<sup>37</sup> Bresler, Ch 4, n 269, 1301.

<sup>38</sup> See the previous discussions in Part 1 of Chapter 1 at [1.1.12] and Part 11 of Chapter at [4.11.1].

<sup>39</sup> Zacharias, Ch 4, n 9, 46.

<sup>40</sup> *R v Bain* [1992] 1 SCR 91 at 117 per Gonthier J.

<sup>41</sup> See, for example, Hora, Schma and Rosenthal, Ch 1, n 90, 477-479. See also the discussion in Chapter 1, n 90.

and 6, notwithstanding the major problems of practice and principle that have emerged in practice over recent years, the prosecutorial role regarding its duty in furnishing relevant material to the defence must be that of a minister of justice. There is a need for a formal duty of full and frank disclosure. It is acknowledged that even in the conduct of the prosecution case at trial there will be some circumstances where it is incumbent on prosecution counsel to act with scrupulous restraint and to refrain from appealing to passion or prejudice, particularly where the accused might be legally unrepresented or the case might be of a particularly sensitive or sordid nature.

[11.2.4] With respect to other prosecutorial duties it is timely to reconsider the modern prosecutorial role and to discard the minister of justice approach. One must ask whether the minister of justice model has outlived its original rationale and remains an appropriate guide for all of the many functions of the modern prosecutor. The prosecutor should never act dishonestly, vindictively or unfairly but that is not tantamount to insisting that prosecution counsel should always assume the role of the detached minister of justice. In short the prosecutor’s mantra should be a “single precept... to press the prosecution case forcefully, according to the rules.”<sup>42</sup> It is argued that with respect to some prosecutorial functions the prosecutor should be free to assume a vigorous and adversarial role. In particular the prosecution should enjoy a broad discretion to call only those witnesses who support its case. Such a position accords with the prosecutor’s legitimate function in an adversarial criminal process. It is not the prosecutor’s role to act as defence counsel.

[11.2.5] Similarly, in the conduct of the prosecution case at trial it is my argument that if the accused is legally represented and there exists broad equality between the prosecution and the defence, then the prosecutor should be free to assume a more robust and vigorous role in the proceedings similar to that played by defence counsel. Such an approach is consistent with the prosecutor’s proper role within a modern adversarial criminal process of seeking the conviction of the accused. As Zacharias argues:

As a practical matter, both prosecutors and the public expect zeal from the criminal justice arm of the government. Defendants have their attorney. These attorneys take full advantages of the trial process, including the manipulation of legal technicalities. Prosecutors have the job of evening out the battle.<sup>43</sup>

[11.2.6] The proposition that the modern prosecutor can act simultaneously as both minister of justice and adversarial advocate is “inherently contradictory and perhaps hopeless.”<sup>44</sup> As Zacharias suggests, it may now be proper for modern prosecutors, unlike their historical counterpart, in some circumstances at least, to “fight fire with fire.” Justice in the modern criminal process is not served by submissive prosecutors who are unable or unwilling to advance the Crown case effectively.<sup>45</sup> In some situations, as Farrell

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<sup>42</sup> Corrigan, Ch 1, n 235, 542. See also Bresler (1995-1996), Ch 4, n 236, 544, n 27.

<sup>43</sup> Zacharias, Ch 4, n 9, 56, n 54.

<sup>44</sup> *Ibid*, 104. See also Hoeffel, Ch 1, n 45, 1141.

<sup>45</sup> See, for example, Zacharias, Ch 4, n 9, 48 and Falkenes, G, “The Prosecutor: A Look at Reality” (1975) 7 SW Uni L Rev 98.

suggests, “Justice requires that the prosecutor become a zealous advocate. The prosecutor must present the evidence vigorously in order that justice is served.”<sup>46</sup>

[11.2.7] A neat definition of the prosecutorial role that is capable of universal application is elusive. But, perhaps, no more erudite and principled but workable definition of the modern prosecutorial role is provided than that offered by Nelson Mandela in 2000 to an international gathering of prosecutors.<sup>47</sup> In his comments Mandela brought prosecutors “the gift of a new characterisation of themselves which leaves far behind the humourless, straight-laced and hapless image”<sup>48</sup> of historical and popular perception:

The challenge for the modern prosecutor is to become a lawyer for the people. It is your duty to provide an effective relationship with the community and to ensure that the rights of victims are protected. It is your duty to prosecute fairly and effectively according to the rule of law; and to act in a principled way without fear, favour or prejudice. It is your duty to build a prosecution service that is effective deterrent to crime and is known to demonstrate great compassion and sensitivity to the people that it serves.<sup>49</sup>

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<sup>46</sup> Farrell, Ch 1, n 56, 305.

<sup>47</sup> Nelson Mandela was presented with the 2000 International Association of Prosecutors Medal of Honour at the IAP Annual Conference in Cape Town, September 2000.

<sup>48</sup> Angiolini, Ch 1, n 5. See the previous discussion in Part 1 of Chapter 1 at [1.1.1] and Part 2 of Chapter 2 of the traditional negative perception of the prosecutorial role.

<sup>49</sup> Mandela’s remarks quoted by Angiolini, Ch 1, n 5.



## BIBLIOGRAPHY

### BOOKS

Amos K, *The Fenians in Australia: 1865-1880* (Sydney, NSW University Press, 1988)

Anderson J, Williams N and Clegg L, *The New Law of Evidence: Annotation and Commentary on the Uniform Evidence Acts (2nd ed)* (Chatswood, LexisNexis Butterworths, 2008)

Aronson A, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (Carlton South, ALJA, 1992)

Atkinson D and Moloney T, *Blackstone's Guide to the Criminal Procedure Rules 2005* (Oxford, Oxford University Press, 2005)

Atlay J, *Famous Trials of the Century* (London, Grant Richards, 1899)

Baldwin J and McConville M, *Courts, Prosecution and Conviction* (Oxford, Clarendon Press, 1981)

Baldwin J and McConville, M, *Negotiated Justice* (London, Martin Robertson, 1977)

Bankowski Z and Mungham G, *Images of Law* (London, Routledge, and Kagan Paul Ltd, 1976)

Baxter C, *Breaking the Bank: an Extraordinary Colonial Robbery* (Crows Nest, Allen & Unwin, 2008)

Beattie J, *Crime and the Courts in England: 1660-1800* (Oxford, Clarendon Press, 1986)

Bennet A, *The Queen v Palmer. Verbatim Report of The Trial of William Palmer at the Central Criminal Court, Old Bailey, London, May 14 and Following Days, 1856* (London, J Allen, 1856)

Bentley D, *English Criminal Justice in the Nineteenth Century* (London, Hambledon Press, 1998)

Berman G and Feinblatt J, *Problem Solving Courts: a Brief Primer* (New York, New York Centre for Policy Innovation, 2001)

Berman G and Feinblatt J, *Good Courts: The Case for Problem Solving Justice* (New York, the New Press, 2005)

Berman G and Fox, A, *Lasting Change or Passing Fad: Problem Solving Justice in England and Wales* (London, Policy Exchange, 2006)

Blackburn E, *Broken Lives – The Complete Life and Crimes of Serial Killer Eric Edgar Cooke* (South Yarra, Hardie Grant, 2002)

Blackwell L, *Death Cell at Darlinghurst* (Melbourne, Hutchinson Publishing 1970)

Bleackley H, *The Trial of Henry Flauntleroy and Other Famous Trials for Forgery* (London, William Hodge and Co, 1924)

Boon A and Levin J, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford, Hart Publishing, 1999)

Borchard E, *Convicting the Innocent: Errors of the Criminal Justice System* (Hamden, Archon Books, 1961)

Botein B and Gordon M, *The Trial of the Future: Challenge to the Law* (New York, Simon Schuster, 1963)

Boyce J, *Van Diemen's Land* (Melbourne, Black Inc, 2008)

Bousfield R, *Report of the Trial of Daniel McNaughton at the Central Criminal Court, Old Bailey, (on Friday 3 and Saturday 4 March 1843) for the wilful murder of Edward Drummond Esq* (London, Henry Renshaw, 1843)

Braithwaite J, *Restorative Justice and Responsive Regulation* (Oxford, Oxford University Press, 2002)

British Academy of Forensic Sciences and the Criminal Bar Association, *Survey of the Practising Independent Bar into the Operation in Practice of the Criminal Procedure and Investigation Act 1996 Disclosure Provisions* (London, BAFS, 1999)

Butler T and Garsia M (eds), *Archbold Criminal Pleading, Evidence and Practice (31st edition)* (London, Sweet & Maxwell, 1943)

Buzawa E and Buzawa C, *Domestic Violence: the Criminal Justice Response* (Thousand Oaks, Sage Publications Inc, 2003)

Cairns D, *Advocacy and the Making of the Adversarial Criminal Trial: 1800-1865* (Oxford, Clarendon Press, 1998)

Carboni R, *The Eureka Stockade, 1855* (reprint) (Melbourne, Melbourne University Press, 1993)

Cash M, *The Bushranger of Van Diemen's Land in 1843-4 (5<sup>th</sup> ed)* (Hobart, J Walch & Sons, 1929)

Castles A, *An Australian Legal History* (Sydney, Law Book Co Ltd, 1982)

Castles A and Castles J, *Ned Kelly's Last Days: Setting the Record Straight on the Death of an Outlaw* (Crow's Nest, Allen and Unwin, 2005)

Cavadino P and Gibson, G, *Introduction to the Criminal Justice Process* (Winchester, Waterside Press, 2002)

Central Criminal Court, *The Trials of Patrick Maxwell Stewart Wallace and Michael Shaw Stewart Wallace* (London, Williams & Son, 1841)

Central Criminal Court, *Illustrated and Unabridged Edition of the Times Report of the Trial of William Palmer for poisoning John Parsons Cook at Rugeley: from the shorthand notes taken in the Central Criminal Court from day to day* (London, Ward & Lock, 1856)

Chambers G and Millar A, *Prosecuting Sexual Assault* (Edinburgh, Scottish Office Central Research Unit, 1986)

Chandos J, *Norman Birkett: Uncommon Advocate* (London, Mayflower Books Ltd, 1963)

Chappell D and Wilson P (eds), *The Australian Criminal Justice System* (Sydney, Butterworths, 1972)

Chappell D and Wilson P, *Issues in Australian Crime and Criminal Justice* (Chatswood, Lexis Nexis Butterworths, 2005)

Clark M, *For The Term of His Natural Life* (reprint) (Sydney, Harper Collins Publishing, 2002)

Cockburn J, *Crime In England: 1550-1800* (London, Methuen, 1977)

Corker D, *Disclosure in Criminal Proceedings* (London, Blackstone Press Ltd, 1997)

Corker D and Parkinson S, *Disclosure in Criminal Proceedings* (Oxford, Oxford University Press, 2009)

Corker D, and Young D, *Abuse of Process in Criminal Proceedings* (London, Butterworths, 2003)

Corns C, *Anatomy of Long Criminal Trials* (Canberra, AIJA, 1997)

Cottu M, *On the Administration of Criminal Justice in England; and the Spirit of the English Government* (London, Richards Stevens, 1822)

Cowdrey N, Hancock B and Myjer E, *Human Rights Manual for Prosecutors* (The Hague, International Association of Prosecutors, 2003)

Curthoys J and Kendall C, *Advocacy: an Introduction* (Lexis Nexis Butterworths, Sydney, 2005)

Curtis J, *The Mysterious Murder of Maria Marten at Polstead in Suffolk* (reprint) (Geoffrey Bless, London, 1928)

Dal Pont G, *Lawyers' Professional Responsibility in Australia and New Zealand (4<sup>th</sup> ed)* (Pyrmont, Lawbook Co, 2009)

Davis J, *The Tasmanian Gallows: A Study of Capital Punishment* (Hobart, Cat & Fiddle Press, 1974)

Devlin P, *The Criminal Prosecution in England* (New Haven, Yale University Press, 1958)

Devlin P, *Trial by Jury (2<sup>nd</sup> ed)* (London, University Paperback, 1966)

Dickenson W and Talfourd T, *A Practical Guide to Quarter Sessions and other Sessions of the Peace* (3<sup>rd</sup> ed) (London, Baldwin and Craddock, 1829)

Douglass J, *Ethical Issues in Prosecution* (Houston, University of Houston, 1988)

Drew K, "The New South Wales Police Prosecutor" in Vernon J and Regan F (eds), *Improving Access to Justice: the Future of Paralegal Professionals: proceedings of a conference held 19-20 February 1990* (Canberra, Australian Institute of Criminology, 1991)

Du-Cann R, *The Art of the Advocate* (Harmondsworth, Penguin Books, 1964)

Eastwood C and Patton W, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (Brisbane, Queensland University of Technology, 2002)

Ede R and Shepherd E, *Active Defence: A Solicitor's Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases* (1<sup>st</sup> ed) (London, The Law Society, 1997)

Ede R and Shepherd E, *Active Defence* (London, Law Society Publishing, 2000)

Edwards J, *The Law Officers of the Crown* (London, Sweet and Maxwell, 1964)

Emsley C, *Crime and Society in England, 1750-1900* (London, Longman, 1987)

Ensor D, *I was a Public Prosecutor* (London, Robert Hale Ltd, 1958)

Epp J, *Building on the Decade of Disclosure in Criminal Procedure* (London, Cavendish Publishing, 2001)

Fairfield L, *The Trial of Peter Barnes and Others (The IRA Coventry Explosion of 1939)* (London, William Hodge & Co, 1953)

Felstead S, *Sir Richard Muir: a Memoir of a Public Prosecutor* (London, John Lane, 1927)

Findlay M, et al, *Australian Criminal Justice* (3<sup>rd</sup> ed) (South Melbourne, Oxford University Press, 2005)

Findlay M, et al, *Australian Criminal Justice* (4<sup>th</sup> ed) (Melbourne, Oxford University Press, 2009)

Finn B, *Law and Government in Colonial Australia* (Melbourne, Oxford University Press, 1987)

Fionda J, *Public Prosecutors and Discretion: a Comparative Study* (Oxford, Oxford University Press, 1995)

Foster M, *A Report of Some Proceedings... for the Trial of the Rebels in the Year 1746 ...To Which are Added Discourses upon a Few Branches of Crown Law* (London, W Strahan and M Woodfall, 1762)



Fox R, *Victorian Criminal Procedure (8<sup>th</sup> ed)* (Melbourne, Monash Law Book Co-Op Ltd, 1995)

Frank J, *Courts on Trial: Myth and Reality in American Justice* (Princeton, Princeton University Press, 1949)

Frank J and Frank B, *Not Guilty* (New York, Doubleday and Company Ltd, 1957)

Freiberg A, "Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism" in McMahon M (ed), *Therapeutic Jurisprudence* (Annandale, Federation Press, 2003)

Glissan J and Tilmouth S, *Advocacy in Practice (3<sup>rd</sup> ed)* (Sydney, Butterworths, 1998)

Grosman B, *The Prosecutor: An Inquiry into the Exercise of Discretion* (Toronto, University of Toronto Press)

Gurner F, *The Practice of the Criminal Law of the Colony of Victoria* (Melbourne, Stillwell and Knight, 1871)

Gurney J and Gurney W, *The Trial of Richard Patch for the Wilful Murder of Issac Blight* (London, M Gurney, 1806)

Hannibal M and Mountford L, *LPC Handbook on Criminal Litigation 2007-2008* (Oxford, Oxford University Press, 2007)

Harris A, *Settlers and Convicts* (reprint) (Melbourne, Melbourne University Press, 1964)

Hastings P, *Cases in Court* (London, William Heinemann Ltd, 1949)

Hawkins W, *A Treatise of Pleas of the Crown (Vol 2)* (London, E Nutt, 1721)

Hawkins G, *Beyond Reasonable Doubt* (Sydney, Australian Broadcasting Commission, 1977)

Hawles J, *Remarks upon the Tryals of Edwards Fitzharris* (London, Jacob Tonson, 1689)

Hayes D, et al, *Albion's Fatal Tree: Crime and Society in eighteenth-century England* (New York, Pantheon Books, 1977)

Hooper L and Ormerod D, *Blackstone's Criminal Practice 2009* (Oxford, Oxford University Press, 2009)

Howard P, *Criminal Justice in England: A Study in Law Administration* (Buffalo, William S Hein Co, 1987)

Hilbery M, *Duty and Art in Advocacy* (London, Stevens and Son, 1946)

Hirst J, *Convict Society and its Enemies* (Sydney, Allen & Unwin), 1987)

Hirst J, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Sydney, Allen & Unwin, 1988)

- Hostettler J, *Fighting for Justice: The History and Origin of Adversary Trial* (Winchester, Waterside Press, 2006)
- Hostetter J, *The Politics of Criminal Law Reform in the 19<sup>th</sup> Century* (Chichester, Barry Rose Law Publishing, 1992)
- Hughes R, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (London, Collins Harvill, 1987)
- Hunter J, *et al*, *Litigation I: Civil Procedure (7<sup>th</sup> ed)* (Chatswood, LexisNexis Butterworths, 2005)
- Hunter J, *et al*, *Litigation II: Evidence and Criminal Procedure (7<sup>th</sup> ed)* (Chatswood, LexisNexis Butterworths, 2005)
- Hunter J and Cronin K, *Evidence, Advocacy and Ethical Practice* (Sydney, Butterworths, 1995)
- Inns of Court School of Law, *Professional Conduct* (Oxford, Oxford University Press, 2002)
- Ismaili K (ed), *U.S. Criminal Justice Policy; a Contemporary Reader* (London, Jones and Bartless Learning, 2010)
- Jacobs P, *Famous Australian Trials* (Melbourne, Robertson & Mullens Ltd, 1942)
- Jervis J, *Archbold's Summary of the Law Relating to Pleading and Evidence in Criminal Cases* (New York, Banks, Gould & Co, 1846)
- Johnstone, R, *Occupational Health and Safety, Courts and Crime: the Legal Construction of Health and Safety Offences in Victoria* (Sydney, Federation Press, 2003)
- Jones I, *Ned Kelly: A Short Life* (Port Melbourne, Lothian Books, 1995)
- Keane A, *The Modern Law of Evidence (7<sup>th</sup> ed)* (Oxford, Oxford University Press, 2008)
- Keneally J, *The Complete History of the Kelly Gang and their Pursuers* (Robertson & Mullen, Melbourne, 1955)
- Kennedy L, *The Trial of Stephen Ward* (London, Penguin Books, 1964)
- Kercher B, *An Unruly Child: A History of Law in Australia* (Sydney, Allen and Unwin, 1995)
- King M *et al*, *Non-Adversarial Justice* (Annandale, Federation Press, 2009)
- Knight A, *The Life of the Law: The People and Cases that have Shaped Our Society, from King Alfred to Rodney King* (New York, Oxford University Press, 1998)
- Krumholz S, "Criminal Justice Policy and Problem Solving Courts" in Ismaili K (ed), *U.S. Criminal Justice Policy; a Contemporary Reader* (London, Jones and Bartless Learning, 2010) 117

Lane B, "Fair Trial and the Adversary System: Withholding of Exculpatory Evidence by Prosecutors" in Basten J *et al* (eds), *The Criminal Injustice System* (Sydney, Australian Legal Workers Group (NSW), 1981)

Langbein J, *The Origins of Adversarial Criminal Trial* (Oxford, Oxford University Press, 2003)

Law Society, *CPIA 1996 Disclosure Provisions Survey* (London, Law Society, 1999)

Law Society of Ireland, *A Guide to the Professional Conduct of Solicitors in Ireland* (2<sup>nd</sup> ed) (Dublin, Law Society of Ireland, 2002)

Lees S, *Carnal Knowledge: Rape on Trial* (London, Hamish Hamilton, 1996)

Leng R and Taylor R, *Blackstone's Guide to the Criminal Procedures and Investigations Act 1996* (London, Blackstones, 1996)

Levy M, *Governor George Arthur: A Colonial Benevolent Despot* (Melbourne, Georgian House, 1953)

Lewis C, "The Prosecution Service Function within the English Criminal Justice System" in Jehle J and Wade M (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Berlin, Springer, 2006)

Lewis J, *The Victorian Bar* (London, Robert Hale, 1982)

Liddy P, *The Rainbird Murders 1861* (Norwood, Peacock Publications, 1993)

Lievore D, *Prosecutorial Discretion in Adult Sexual Assault Cases: an Australian Study* (Canberra, Australian Institute of Criminology, 2004)

Luban D, "The Adversary System Excuse" in Luban D (ed), *The Good Lawyers: Lawyers' Roles and Lawyers' Ethics* (Totowa, Rowman and Allanheld, 1984)

Lyne C, *Life of Sir Henry Parkes* (Sydney, George Robertson and Co, 1896)

Mack K and Anleu R, *Pleading Guilty: Issues and Practices* (Carlton South, AIJA, 1995)

Macnally L, *The Rules of Evidence on Pleas of the Crown* (London, J Butterworth, 1802)

Marchetti E and Daly K, *Indigenous Courts and Justice Practices in Australia* (Canberra, Australian Institute of Criminology, 2004)

Martin A, *Henry Parkes: A Biography* (Melbourne, Melbourne University Press, 1980)

May A, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill, University of North Carolina Press, 2003)

May J, "The Responsibility of the Prosecutor to the Court" in Williams, J (ed) *The Role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economics and Political Science in January 1987* (Aldershot, Avebury, 1988)

- Meredith L, *Notes and Sketches of New South Wales During a Residence in that Colony from 1839 to 1844* (London, John Murray, 1844)
- Miles R, *Waterloo Creek: The Australia Day Massacre of 1838 and George Gipps and the British Conquest of New South Wales* (Ringwood, Penguin Books, 1992)
- Mohony J, *Eureka* (Melbourne, Melbourne University Press, 2001)
- Moisidis C, *Criminal Discovery: From Truth to Proof and Back Again* (Sydney, Sydney Institute of Criminology, 2008)
- Molony J, *John Hubert Plunkett: An Architect of Freedom in New South Wales, 1832-1869* (Canberra, Australian National University Press, 1973)
- Montgomery-Hyde H, *Norman Birkett: The Life of Lord Birkett of Ulverston* (London, Hamish Hamilton, 1964)
- Moody S and Toombs J, *Prosecution in the Public Interest* (Edinburgh, Scottish Academic Press, 1982)
- Moore, T, *Death or Liberty: Rebels and Radicals Transported to Australia 1788-1868* (Sydney, Murdoch Books Australia, 2010)
- Mudie J, *The Felony of New South Wales* (Melbourne, Landsowne Press, 1964)
- Murphy P (ed), *Blackstone's Criminal Practice; 2005* (Oxford, Oxford University Press, 2005)
- Murphy P (ed), *Blackstone's Criminal Practice; 2009* (Oxford, Oxford University Press, 2009)
- Murray J, "The Paralegal Police Prosecutor: For How Long" in Vernon J and Regan F (eds), *Improving Access to Justice: the Future of Paralegal Professionals: proceedings of a conference held 19-20 February 1990* (Canberra, Australian Institute of Criminology, 1991)
- Neal D, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, Cambridge University Press, 1991)
- Niblett J, *Disclosure in Criminal Proceedings* (London, Sweet & Maxwell, 1996)
- O'Mahony P (ed), *Criminal Justice in Ireland* (Dublin, Institute of Public Administration, 2002)
- O'Sullivan J, *A Most Unique Ruffian: The Trial of FB Deeming, Melbourne, 1892* (Melbourne, FW Cheshire, 1968)
- Parkes H, *Fifty Years in the Making of Australian History* (London, Longmans, 1892)
- Payne J, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Canberra, Australian Institute of Criminology, 2007)

- Pattenden R, *Judicial Discretion and Criminal Litigation* (Oxford, Oxford University Press, 1990)
- Peters A, *No Monument of Stone: Elizabeth Woolcock's Struggle through Life* (Adelaide, A Peters, 1992)
- Phillips J, *The Trial of Ned Kelly* (Sydney, Law Book Co, 1987)
- Pirro J, *To Punish and Protect: a DA's Fight Against a System that Coddles Criminals* (New York, Touchstone Books, 2005)
- Potas I (ed), *Prosecutorial Discretion (Seminar Proceedings No 6)* (Canberra, Australian Institute of Criminology 1985)
- Radzinowicz L, *A History of English Criminal Law and its Administration from 1750 (Vol 3): Cross-Currents in the Movement for Reform of the Police* (New York, MacMillan, 1957)
- Reynolds H, *Frontier: Aborigines, Settlers and Land* (Sydney, Allen & Unwin, 1987)
- Richardson J, (ed) *Archbold Criminal Pleading, Evidence and Practice* (2002 edition) (London, Sweet & Maxwell, 2002)
- Richardson J (ed), *Archbold Criminal Pleading, Evidence and Practice* (2005 edition) (London, Sweet & Maxwell, 2004)
- Richardson J (ed), *Archbold: Criminal Pleading and Practice (2006 ed)* (London, Sweet and Maxwell, 2006)
- Roberts J, *et al*, *Penal Populism and Public Opinion – Lessons from Five Countries* (New York, Oxford University Press, 2003)
- Robson L, *A History of Tasmania* (Oxford, Oxford University Press, 1983)
- Rock P, *The Social World of an English Crown Court: Witnesses and Professionals in the Crown Court Centre at Wood Green* (Oxford, Clarendon Press, 1993)
- Roderick C, *John Knatchbull: From Quarterdeck to Gallows* (Sydney, Angus and Robertson, 1963)
- Rose J, *et al*, *Innocents: How Justice Failed Stefan Kiszko and Lesley Molseed* (London, Fourth Estate, 1997)
- Rozenberg J, *The Case for the Crown: The Inside Story of the Director of the Public Prosecutions* (Wellingborough, Equation, 1987)
- Rushden G, *History of Australia (Vol ii)* (Melbourne, 1884)
- Sanders A and Young R, *Criminal Justice (2<sup>nd</sup> ed)* (Butterworths, London, 2000)
- Schlesinger P and Tumber H, *Reporting Crime: the Media Politics of Criminal Justice* (Oxford, Oxford University Press, 1994)

- Shaw A, *The Story of Australia* (London, Faber & Faber, 1960)
- Shroeder J, "Some Ethical Problems in Criminal Law" in *1963 Special Lectures of the Law Society of Upper Canada* (Toronto, Law Society of Upper Canada, 1963)
- Sieghart P, "A View from Justice" in Williams J, *The Role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economics and Political Science in January 1987* (Aldershot, Avebury, 1988)
- Skelhorn N, *The Memoirs of Sir Norman Skelhorn: Public Prosecutor* (London, Harrap Ltd, 1981)
- Slapper G, *Organisational Prosecutions* (Aldershot, Ashgrove, 2001)
- Slapper G and Kelly D, *The English Legal System 2009/2010 (10th ed)* (Abingdon, Cavendish, 2009)
- Smith F (ed), *Historical Studies: Eureka Supplement (2<sup>nd</sup> ed)* (Melbourne, Melbourne University Press, 1965)
- Spencer R, *Jackson's Machinery of Justice (8th ed)* (Cambridge, Cambridge University Press, 1989)
- Sprack J, *Emmins on Criminal Procedure (9<sup>th</sup> ed)* (Oxford, Oxford University Press, 2002)
- Sprack J, *Emmins on Criminal Procedure (10<sup>th</sup> ed)* (Oxford, Oxford University Press, 2004)
- Sprod D, *Alexander Pearce: Convict-Bushranger-Cannibal* (Hobart, Cat and Fiddle Press, 1977)
- St John R, "The Role of the Police in Courts" in Chappell D and Wilson P (eds), *The Australian Criminal Justice System* (Sydney, Butterworths, 1972), p 493-500
- Stephen J, *A History of the Criminal Law of England (Vol 1)* (London, Macmillan and Co, 1883)
- Summers A, *Damned Whores and God's Police* (Ringwood, Penguin, 1975)
- Tapper C, *Cross & Tapper on Evidence (11<sup>th</sup> ed)* (Oxford, Oxford University Press, 2007)
- Taylor C, *Criminal Investigation and Pre-Trial Disclosure in the United Kingdom* (New York, Edwin Meller Press, 2006)
- Taylor D, *Crime, Policing and Punishment in England 1750-1914* (New York, St Martin's Press, 1998)
- Taylor D, *The New Police in Nineteenth Century England: Crime, Conflict and Control* (Manchester, Manchester University Press, 1997)
- Therry R, *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (Sydney, Sydney University Press, 1974)

- Thurgood N, *The Gold Escort Robbery Trials* (Kenshurst, Kangaroo Press, 1988)
- Tibballs G, *Legal Blunders* (London, Robinson, 2000)
- Townsend W, *Modern State Trials* (London; Longman, Brown, Green and Longman, 1850)
- Travers R, *The Grand Old Man of Australian Politics: The Life and Times of Sir Henry Parkes* (Kenshurst, Kangaroo Press, 1992)
- Travers R, *The Phantom Fenians of New South Wales* (Kenshurst, Kangaroo Press, 1986)
- Turnbull C, *Black War: The Extermination of the Tasmanian Aborigines* (Melbourne, Cheshire, 1965)
- Turner H, *Our Little Rebellion: The Story of the Eureka Stockade* (Melbourne, Whitcombe and Tombs, 1912)
- Vernon J (ed), *The Future of Committals: proceedings of a conference held 1-2 May 1990* (Canberra, Australian Institute of Criminology, 1991)
- Vernon J and Regan F (eds), *Improving Access to Justice: the Future of Paralegal Professionals: proceedings of a conference held 19-20 February 1990* (Canberra, Australian Institute of Criminology, 1991)
- Walker C and Starmer K, *Miscarriages of Justice: a Review of Justice in Error* (Oxford, Oxford University Press, 1999)
- Ward J, *Ambushed* (London, Vermilion, 1993)
- Warner, K, *Sentencing in Tasmania (2<sup>nd</sup> ed)* (Sydney, Federation Press, 2002)
- Watson F (ed), *Historical Records of Australia, Series 1, Vol XIII* (Sydney, Library Committee of Commonwealth Parliament, 1919)
- Webb A, *The Natweiler Trial* (London, William Hodge and Co, 1949)
- Wexler D, *Therapeutic Justice: the Law as a Therapeutic Agent* (Durham, Carolina Academic Press, 1990)
- White C, *History of Australian Bushrangers (Vol 1)* (Hawthorn, Lloyd O'Neill, 1970)
- Williams J (ed), *The Role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economics and Political Science in January 1987* (Aldershot, Avebury, 1988)
- Wilkinson, G, *An Authentic History of the Cato-Street Conspiracy – with the trials at large* (London, Thomas Kelly, 1820)
- Wilcox A, *The Decision to Prosecute* (London, Butterworths, 1972)
- Windeyer W, *Lectures on Legal History (2<sup>nd</sup> ed (revised))* (Sydney, The Law Book of Australasia, 1957)

Wigmore J, *A Treatise in the System of Evidence in Trials at Common Law*, Chadbourn (rev) (New York, Little Brown and Co, 1974)

Worrall J, "Prosecutors in Problem Solving Courts" in Worrall J and Nugent-Borakove M, *The Changing Role of the American Prosecutor* (Albany, State Univeristy of New York Press, 2008)

Woods G, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (Sydney, Federation Press, 2002)

Wyndham-Brown W, *The Trial of Williams Herbert Wallace* (London, Victor Gollancz, 1933)

Zander M, *Cases and Materials on the English Legal System (10<sup>th</sup> ed)* (Cambridge, Cambridge University Press, 2007)

## ARTICLES

Ackner D, Lord, "More Power to the Executive" (1998) 148 *New Law Journal* 1512

Addison N, "Tell me what you really want" (1998) 148 *New Law Journal* 1061

Anleu S and Mack K, "'Getting through the List': Judgecraft and Legitimacy in the Lower Courts" (2007) 16 *Social and Legal Studies* 341-361

Anonymous, "Irwin on Western Australia" (1835) 7 *Dublin University Magazine* 157

Applegate J, "Witness Preparation" (1989) 68 *Texas Law Review* 277

Aronson M, "Must the Crown Call Adverse Witnesses" [1974] *Australian Current Law Digest* 152

Ashworth A, "Prosecution and Practice in Criminal Justice" [1979] *Criminal Law Review* 480

Ashworth A, "Prosecution, Police and Public – a Good Guide to Good Gatekeepers" (1984) 23 *Howard Journal of Criminal Justice* 65

Ashworth A and Blake M, "Some Ethical Issues in Prosecuting and Defending Criminal Cases" [1998] *Criminal Law Review* 16

Astor H "Unrepresented Defendant Revisited – a Consideration of the Role of the Clerk in Magistrates' Courts" (1986) 13 *Journal of Law and Society* 225

Atkinson J and Roberts D, "'Men of Colour': John Joseph and the Eureka Stockade Treason Trials" (2008) 10 *Journal of Australian Colonial History* 75

Badgery-Parker J, "The Criminal Process in Transition: Balancing Principle and Pragmatism – Part 1" (1994-1995) 4 *Journal of Judicial Administration* 171



- Bagaric M, "The Diminishing Right of Silence" (1997) 19 *University of Sydney Law Review* 366
- Bala N, "The Supreme Court Sends a Clear Message (Again): Children are not Adults" (1999) 27 *Criminal Reports (5<sup>th</sup> Series)* 195
- Baldwin J, "Advance Disclosure: Problems Arising" (1988) 152 *Justice of the Peace Note* 259
- Baldwin J and Hunt A, "Prosecutors Advising in Police Stations" [1999] *Criminal Law Review* 521
- Beattie J, "Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries" (1991) 9 *Law and History Review* 221
- Beck S, "Under Investigation: a Review of Police Prosecutions in New Zealand's Summary Jurisdiction" (2006) 12 *Auckland Law Review* 150
- Bedau H and Radelet M, "Miscarriages of Justice in Potentially Capital Cases" (1987) 40 *Stanford Law Review* 21
- Bennet J, "The Establishment of Juries in New South Wales" (1961) 3 *Sydney Law Review* 462
- Bennion F, "The New Prosecution Arrangements: The Crown Prosecution Service" [1986] *Criminal Law Review* 3
- Biber K, "Cannabilism and Colonialism" (2005) 27 *Sydney Law Review* 623
- Biber K, "On Not Speaking: The Right to Silence, the Gagged Trial Judge and the Spectre of Child Sexual Abuse" (2005) *Alternative Law Journal* 19
- Binns J and Corker D, "False Economies" (2008) 158 *New Law Journal* 17
- Birch D, "Commentary [to *R v Balmforth*]" [1992] *Criminal Law Review* 826
- Birch D, "Commentary [to *R v Brown and Brown*]" [1996] *Criminal Law Review* 660
- Birch D, "Commentary [to *R v Browning*]" [1995] *Criminal Law Review* 229
- Birch D, "Commentary [to *R v Grafton*]" [1992] *Criminal Law Review* 828
- Birch D, "Commentary [to *R v Keane*]" [1995] *Criminal Law Review* 22
- Birch D, "Commentary [to *R v Russell-Jones*]" [1995] *Criminal Law Review* 834
- Birch D, "Commentary [to *R v Witts & Witts*]" [1991] *Criminal Law Review* 562
- Birch D and Taylor C, "People Like Us: Responding to Allegations of Past Abuse in Care" [2003] *Criminal Law Review* 823

- Bowen-Colthurst, T, "Some Observations on the Duties of a Prosecutor" 25 *Criminal Law Quarterly* 377
- Brooks J, "Ethical Obligations of the Crown Attorney – Some Guiding Principles and Thoughts" (2001) 59 *University of New Brunswick Law Journal* 229
- Bresler K, "I Never Lost a Trial: When Prosecutors Keep Score of Criminal Convictions" (1995-96) 9 *Georgetown Journal of Legal Ethics* 537
- Bresler K, "Pretty Phrases: The Prosecutor as 'Minister of Justice' and 'Administrator of Justice'" (1995) 9 *Georgetown Journal of Legal Ethics* 1301
- Bresler K, "Seeking Justice, Seeking Election and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates Campaigning on Capital Convictions" (1994) 7 *Georgetown Journal of Legal Ethics* 941
- Bress D, "The Defence Counsel's Responsibility" (1966) 64 *Michigan Law Review* 1493
- Bull H, "The Career Prosecutor of Canada" (1962) 53 *Journal of Criminal Law, Criminology and Police Science* 89
- Burke A, "Revisiting Prosecution Disclosure" (2009) 84 *Indiana Law Journal* 481
- Burton M, "Judicial Monitoring of Compliance: Introducing 'Problem Solving' Approaches to Domestic Violence Courts in England and Wales" (2006) 20 *International Journal Law, Policy and the Family* 366
- Busby K, "Discriminatory Uses of Personal Records in Sexual Assault Trials" (1997) 9 *Canadian Journal of Women and the Law* 148
- Byrne J, "The Right to a Speedy Trial" (1988) 62 *American Law Journal* 160
- Cairns D, "Correspondence" (2002) 20 *Law and History Review* 445
- Campbell I, "Discovery in Committal Proceedings" (1985) 9 *Criminal Law Journal* 278
- Campbell I, "The Role of the Prosecutor in Sentence" (1985) 9 *Criminal Law Journal* 202
- Caplow S, "What if there is no Client? Prosecutors as 'Counsellors' of Crime Victims" (1998) 5 *Clinical Law Review* 1
- Cassidy M, "Character and Context: What Virtue Theory can Teach us about a Prosecutor's Ethical Duty to 'Seek Justice'" (2006) 82 *Notre Dame Law Review* 635
- Chesterman M, "Criminal Trial Juries: From Penal Colonies to Federal Democracy" (1999) 62 *Law and Contemporary Problems* 69
- Choo A, "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited" [1995] *Criminal Law Review* 864
- Corns C, "Judicial Termination of Defective Prosecutions: Stay Applications" (1997) 16 *University of Tasmania Law Review* 75

- Corns, C, "Police Summary Prosecutions in Australia and New Zealand: Some Comparisons" (2000) 19 *University of Tasmania Law Review* 280
- Corrigan C, "On Prosecutorial Ethics" (1986) 13 *Hastings Constitutional Law Quarterly* 537
- Corsilles A, "No Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution" (1994) *Fordham Law Review* 853
- Cossins A and Pilkinton R, "Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials" (1996) 19 *University of New South Wales Law Journal* 222
- Cowdrey N, "Hot Seat or Siberia" [1995] *Journal of New South Wales Bar Association* 5
- Cox, E, "The Advocate: His Training, Practice, Rights and Duties. Cross-Examination," *The Law Times*, 20 September 1851, 246
- Cretney A and Davies G, "Prosecuting 'Domestic' Assault" [1996] *Criminal Law Review* 162
- Cretney A and Davies G, "Prosecuting Domestic Assault: Victims Failing Courts or Courts Failing Victims?" (1997) 36 *Howard Journal of Criminal Justice* 146
- Damaska, M, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure" (1973) 121 *University of Pennsylvania Law Review* 506
- Damaska M, "Presentation of Evidence and Fact Finding Precision" (1975) 123 *University of Pennsylvania Law Review* 1083
- Dandurand Y, "The Role of Prosecutors in Promoting and Strengthening the Rule of Law" (2007) 47 *Crime, Law and Social Change* 247
- Darbyshire P, "The Lamp that shows that Freedom lives – is it worth the Candle?" [1991] *Criminal Law Review* 740
- Darbyshire P, "An Essay on the Importance and Neglect of the Magistracy" [1997] *Criminal Law Review* 627
- Dawkins K, "Defence Disclosure in Criminal Cases" [2001] *New Zealand Law Review* 35
- Dawson J, "Production of Therapeutic Records to the Defence" (1998) 5 *Psychiatry Psychology and Law* 63
- De Sanctis L, "Bridging the Gap between the Rules of Evidence and Justice for Victims of Domestic Violence" (1996) *Yale Journal of Law and Feminism* 359
- Deal C, "Brady Materiality Before Trial: The Scope of the Duty to Disclose and the Right to Trial by Jury" (2007) 82 *New York University Law Review* 1780
- Dennis A, "Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power" (2008) 57 *Duke Law Journal* 131

- Dennis I, "The Criminal Justice and Public Order Act: the Evidence Provisions" [1995] *Criminal Law Review* 4
- Duffy B, *et al*, "Closing the Gap: Crime Control and Public Perception" (2008) 22 *International Review of Law* 17
- Eakin C, "RPS v R: The Resilience of the Accused's Right to Silence" (2000) 22 *University of Sydney Review* 669
- Editorial, "Bubble Blowing" (2000) 150 *New Law Journal* 209
- Editorial, "Commentary" [to *R v Epping and Harrow Justices, ex parte Massaro*] [1973] *Criminal Law Review* 109
- Editorial, "Costly Blunders" (1993) 143 *New Law Journal* 1701
- Editorial, "Crown Prosecutions – Duty to Make all Evidence Available" (1936) 100 *Justice of the Peace Note* 553
- Editorial, "Disclosing the Evidence" (1995) 159 *Justice of the Peace Note* 277
- Editorial, "Financial Restraints on the CCRC" (2007) 171 *Justice of the Peace Note* 825
- Editorial, "Prosecution should have tendered its evidence" (1994) 158 *Justice of the Peace Note* 459
- Editorial, "Prosecutors are Failing in their Statutory Disclosure Duties" (2008) 158 *New Law Journal* 683
- Editorial, "Unacceptable Disclosure" (1992) 142 *New Law Journal* 350
- Eggleston, R, "What is Wrong with the Adversary System?" (1975) 49 *Australian Law Journal* 428
- Elkington G, "Discovery upon Indictment in New South Wales" (1980) 4 *Criminal Law Journal* 4
- Ellison L, "The Protection of Vulnerable Witnesses in Court: an Anglo-Dutch Comparison" (1993) 3 *International Journal of Evidence and Proof* 29
- Ellison L, "Prosecuting Domestic Violence without Victim Participation" (2002) 65 *Modern Law Review* 834
- English M, "A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?" (1999) 68 *Fordham Law Review* 525
- Erez E, "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice" [1999] *Criminal Law Review* 545
- Evans J, "Miscarriages of Justice – a Police Perspective" (1993) 55 *Police Journal* 9

Falkenes G, "The Prosecutor: A Look at Reality" (1975) 7 *Southwestern University Law Review* 98

Farrell R, "Advocacy, Justice and Prosecutorial Misconduct: the Death of the Prosecutor's Reasonable Inference on Credibility Issues" (2002) 41 *Washburn Law Journal* 299

Fenwick H, "Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process" (1997) 60 *Modern Law Review* 317

Ferguson-Gilbert C, "It's not whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality doing Justice for Prosecutors?" (2001) 38 *California Western Law Review* 283

Fionda J, "The CPS and the Police: a Loveless Marriage" (1994) 110 *Law Quarterly Review* 376

Fisher S, "In Search of the Virtuous Prosecutor" (1987) 15 *American Journal of Criminal Law* 197

Fisher S, "The Prosecutor's Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England" (2000) 68 *Fordham Law Review* 1379

Fitzpatrick P, "The British Jury" [2010] *Cambridge Student Law Review* 1

Flatman G and Bagaric M, "The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making" (2001) 6 *Deakin Law Review* 238

Fox R, "Criminal Delay as Abuse of Process" (1990) 10 *Monash University Law Review* 64

Frankel M, "The Search for Truth: An Umpireal View" (1975) 123 *University of Pennsylvania Law Review* 1031

Frater R, "The Seven Deadly Prosecutorial Sins" (2002) 7 *Canadian Criminal Law Reports* 209

Freiberg A, "Managerialism in Australian Criminal Justice: RRI's for KPIs" (2005) 31 *Monash University Law Review* 12

Freiberg A and Fox R, "Silence is not Golden: The Function of Prosecutors at Sentencing in Victoria" (1987) 61 *Law Institute Journal* 555

Ganz G, "Matrix Churchill and Public Interest Immunity" (1993) 56 *Modern Law Review* 564

Gardner M, "An Affair to Remember: Further Refinements of the Prosecutor's Duty to Disclose Exculpatory Evidence" (2003) 68 *Modern Law Review* 469

Gerber R, "Victory versus Truth: the Adversary System and its Ethics" [1987] *Arizona State Law Journal* 3

Gerber R, "On Dispensing Injustice" (2001) 43 *Arizona Law Review* 135

Gersham B, "Prosecutorial Ethics and Victim's Rights: the Prosecutor's Duty of Neutrality" (2005) 9 *Lewis and Clark Law Review* 559

Gersham B, "Prosecutorial Ethics and the Right to a Fair Trial: The Role of the Brady Rule in the Modern Criminal Justice System: Litigating *Brady v Maryland*; Games Prosecutors Play" (2007) 57 *Case Western Reserve Law Review* 531

Gersham B, "The New Prosecutors" (1992) 53 *University of Pittsburgh Law Review* 393

Gersham B, "The Prosecutor's Duty to Truth" (2001) 14 *Georgetown Journal of Legal Ethics* 309

Gersham B, "Witness Coaching by Prosecutors" (2002) 23 *Cardozo Law Review* 829

Gibson R, "The Crimes (Criminal Trials) Act 1999 – a Radical Change" (1999) *Law Institute Journal* 50

Givelber D, "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent" (1997) 49 *Rutgers Law Review* 1317

Gleeson M, "The State of the Judicature" (2000) 216 *Australian Law Journal* 172

Glynn J, "Disclosure" [1993] *Criminal Law Review* 841

Goodpaster, G, "On the Theory of American Adversary Criminal Trial" (1987) 78 *Journal of Criminal Law and Criminology* 118

Gomme I and Hall M, "Prosecutors at Work: Overload and Strain" (1995) 23 *Journal of Criminal Justice* 191

Gourlie W, "Role of the Prosecutor: Fair Minister of Justice with Firm Convictions" (1982) 16 *University of British Columbia Law Review* 295

Green B, "Why Prosecutors should seek Justice" (1999) 26 *Fordham Urban Law Journal* 607

Green B and Zacharias F, "Prosecutorial Neutrality" [2004] *Wisconsin Law Review* 837

Grossman B, "Disclosure by the Prosecution: Reconciling Duty and Discretion" (1988) 30 *Criminal Law Quarterly* 346

Grosman B, "The Role of the Prosecutor: New Adaptations in the Adversarial Concept of Criminal Justice" (1968) 11 *Canadian Bar Journal* 580

Gutman J, "The Reality of Non-Adversarial Justice: Principles and Practice" (2009) 18 *Deakin Law Review* 29

Hall M, "The Relationship between Victims and Prosecutors: Defending Victim's Rights?" [2010] *Criminal Law Review* 31

Hamer D, "The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part 1" (2004) 28 *Criminal Law Journal* 160

- Hanna C, "No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions" (1996) 109 *Harvard Law Review* 1849
- Harvey D, "The Right to Silence and the Presumption of Innocence" [1995] *New Zealand Law Review* 181
- Hay D, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall Law Journal* 165
- Henning P, "Prosecutorial Misconduct and Constitutional Remedies" (1999) 77 *Washington University Law Quarterly* 713
- Hinton M, "The Prosecutor's Duty with Respect to Witnesses: *pro Domina Veritae*" (2003) 27 *Criminal Law Journal* 260
- Hinton M, "Unused Material and the Prosecutor's Duty of Disclosure" (2001) 25 *Criminal Law Journal* 121
- Hoeffel J, "Prosecutorial Discretion at the Core; the Good Prosecutor meets *Brady*" (2005) 109 *Pennsylvania State Law Review* 1133
- Hooper A, "Discovery in Criminal Cases" (1972) 1 *Canadian Bar Review* 445
- Hora P, Schma W and Rosenthal J, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionising the Criminal Justice System's Response to Drug Abuse and Crime in America" (1999) 74 *Notre Dame Law Review* 439
- Howard P, "Criminal Prosecution in England. II. Public Prosecutions" (1930) 30 *Columbia Law Review* 12
- Hoyle C and Sanders A, "Police Response to Domestic Violence" (2000) 40 *British Journal of Criminology* 14
- Hughes B, "The Search for the Truth" (2002) 152 *New Law Journal* 578
- Hughes T, "The Assessment and Credibility of Witnesses" (1996) 2 *The Judicial Review* 295
- Humphreys C, "The Roles and Responsibilities of Prosecuting Counsel" [1955] *Criminal Law Review* 739
- Hunter J, "Abuse of Process Savages Issue Estoppel" (1995) 18 *University of New South Wales Law Journal* 151
- Ipp D, Justice, "Lawyers' Duties to the Court" (1998) 114 *Law Quarterly Review* 63
- Ipp D, Justice, "Reforms to the Adversarial Process in Civil Litigation; Part 1" (1995) 69 *Australian Law Journal* 705
- Ipp D, Justice, "Reforms to the Adversarial Process in Civil Litigation: Part 2" (1995) 69 *Australian Law Journal* 790

Jackson R, "The Federal Prosecutor" (1940) XXXI *Journal Criminal Law and Criminology* 3 (reporting speech given 1 April 1940)

Jones S, "The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence" (1995) 25 *University of Memphis Law Review* 735

Joy P, "The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System" [2006] *Wisconsin Law Review* 339

"Justice": Criminal Justice Committee, "The Prosecution Process in England and Wales" [1970] *Criminal Law Review* 668

Kaye J, "Lawyering for a New Age" (1998) 68 *Fordham Law Review* 1

Kaye J and Knipps S, "Judicial Responses to Domestic Violence: the Case for a Problem Solving Approach" (1999-2000) 27 *Western State University Law Review* 3

Kercher B, "Why the History of Australian Law is not English" (2004) 7 *Flinders Journal of Law* 177

Kidston P, "The Office of Crown Prosecutor (More Particularly in New South Wales)" (1958) 32 *Australian Law Journal* 148

King J, "Prosecutorial Misconduct: the Limitations upon the Prosecutor's Role as an Advocate" (1980) 14 *Suffolk University Law Review* 1095

Kirchmeier J, *et al*, "Vigilante Justice: Prosecutor Misconduct in Capital Cases" 2009) 55 *Wayne Law Review* 1327

Kirching K, "Disclosure in the Irish Criminal Process: Justice and Informality" (1998) 6 *Irish Student Law Review* 17

Kirk D, "Toughness and the Cost of Legal Aid" (2006) 70 *Journal of Criminal Law* 36

KH, "Practical Problems: Duty of the Prosecution in Calling Witnesses" [1959] *Criminal Law Review* 603

KMH, "Criminal Law and Procedure – Presentation of Crown Case – Duty of Crown with Respect to calling Witnesses – Fairness to Accused" (1974) 48 *Australian Law Journal* 497

Krug P, "Prosecutorial Discretion and its Limits" (2002) 50 *American Journal of Comparative Law* 643

Kuo K and Taylor C, "In Prosecutor's We Trust: UK Lessons for Illinois Disclosure" (2007) 38 *Loyola University Chicago Law Journal* 695

Landsman S, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) 75 *Cornell Law Review* 497

Lane W, "Prosecutors: Non-Disclosure of Exculpatory Evidence" [1981] 5 *Criminal Law Journal* 251



Langbein J, "The Criminal Trial before the Lawyers (1978) 45 *University of Chicago Law Review* 263

Langbein J, "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors" (1999) 58 *Cambridge Law Journal* 314

Langbein, J, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1994) *Michigan Law Review* 1047

Langbein J, "Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources" (1983) 50 *University of Chicago Law Review* 1

Lawton F, "Crisis at the Bar – Why the Bar Must Urgently Consider the Future of Training and Practice (1994) 91 *Law Society Gazette* 9

Lemmings D, "Criminal Trial Procedure in Eighteenth-Century England: The Impact of Lawyers" (2005) 26 *Journal of Legal History* 65

Levine S, "Taking Prosecutorial Ethics Seriously: a Consideration of the Prosecutor's Ethical Obligation to Seek Justice in a Comparative Analytical Framework" (2004) 41 *Houston Law Review* 1337

Ley N, "Rights of Audience: Don't let them have them" (1995) 146 *New Law Journal* 1124

Lloyd-Bostock S and Thomas C, "Decline of the Little Parliament: Juries and Jury Reform in England and Wales" (1999) 62 *Law and Contemporary Problems* 7

Luther G, "The Frayed and Tarnished Silver Thread; *Stinchcombe* and the Role of Crown Counsel in Canada in Alberta" (2002) 40 *Alberta Law Review* 567

Lyman J, "The Metropolitan Police Act of 1829: An Analysis of Certain Events influencing the passage and character of the *Metropolitan Police Act*" (1964) 55 *Journal of Criminal Law* 141

Mackie A, *et al*, "Preparing the Prosecution Case" [1999] *Criminal Law Review* 460

MacDonald K, QC, "Building a Modern Prosecution Authority" (2008) 22 *International Review of Law, Computers and Technology* 7

MacFarlane B, "Convicting the Innocent: a Triple Failure of the Justice System" (2006) 31 *Manitoba Law Journal* 403

MacNair D, "Crown Prosecutors and Conflict of Interest: a Canadian Perspective" (2002) 7 *Canadian Criminal Law Review* 257

May A, "Book Review" (2001) 19 *Law and History Review* 676

May A, "Reply" (2002) 20 *Law and History Review* 448

Martin D, "Lessons about the Justice in the 'Laboratory' of Wrongful Convictions, Tunnel Vision and the Construction of Guilt and Informer Evidence" (2002) 70 *University of Missouri at Kansas City Law Review* 847

- Martin G, "The Role and Responsibility of the Defence Advocate" (1969) 12 *Criminal Law Quarterly* 376
- Matthew J, "Public Prosecutions" in "A Criminal Case in England," Panel Discussion (1971) 10 *American Criminal Law Review* 263
- Maude B, "Reciprocal Disclosure in Criminal Trials: Stacking the Deck against the Accused or calling Defence Counsel's Bluff?" (1999) 37 *Alberta Law Review* 715
- McBarnet D, "Magistrates' Courts and the Ideology of Justice" (1981) 8 *British Journal of Law and Society* 181
- McCawley T, "The Production of Prior Statements of Prosecution Witnesses and Cross-Examination thereon in Criminal Cases" (1967) 61 *Queensland Justice of the Peace* 73
- McCrimmon M, "Trial by Ordeal" (1996) 1 *Canadian Criminal Law Review* 31
- McEwan J, "The Changing Face of Criminal Litigation in England and Wales" (2010) 14 *International Journal of Evidence and Proof* 89
- McGonigle S, "Public Accountability for Police Prosecutions" (1996) 8 *Auckland University Law Review* 163
- McLeod J, "CPS Pushes for Trial Powers" (1992) 82 *Law Society Gazette* 5
- McMunigal K, "Are Prosecutorial Standards Different?" (2000) 68 *Fordham Law Review* 1453
- McNiel D and Binder R, "Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence" (2007) 164 *American Journal of Psychiatry* 1395
- MD, "Answer" [1959] *Criminal Law Review* 603
- Medwed D, "The Prosecutor as a Minister of Justice: Preaching to the Converted from the Post-Conviction Pulpit" (2009) 84 *Washington Law Review* 35
- Medwed D, "The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence" (2004) 84 *Boston University Law Review* 125
- Melilli K, "Prosecutorial Discretion in an Adversary System" [1992] *Brigham Young University Law Review* 669
- Menkel-Meadow C, "The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering" (1999) 72 *Temple Law Review* 795
- Mills B, QC, "The Code for Crown Prosecutors" (1994) 158 *Justice of the Peace Note* 461
- Mitchell A, "Disclosure – whose Responsibility?" (1993) 137 *Solicitors' Journal* 854
- Mitchell G, "'No Joy in This for Anyone': Reflections on the Exercise of Prosecutorial Discretion in *R v Latimer*" (2001) 64 *Saskatchewan Law Review* 491

- Munday R, "Calling a Hostile Witness" [1989] *Criminal Law Review* 866
- Murphy T and Whitty N, "What is a Fair Trial? Rape Prosecution, Disclosure and the Human Rights Act" (2000) 8 *Feminist Legal Studies* 143
- Naidis M, "Review: The Women of Botany Bay: A Reinterpretation of the Role of Women in the Origins of Australian Society" [1991] *American Historical Review* 588
- Napley D, "Counsel, Preparation for Trial and Pre-Trial Procedure" in "A Criminal Case in England" (1971) 10 *American Criminal Law Review* 276
- Newark N and Samuels A, "Let the Judge call the Witness" [1969] *Criminal Law Review* 399
- Nichols M, "No One can Serve Two Masters: Arguments Against Private Prosecutors" (2001) 13 *Capital Defence Journal* 279
- O'Connor P, "Prosecution Disclosure: Principle, Practice and Justice" [1992] *Criminal Law Review* 464
- Ormrod D, "Commentary [to *R v Patel*]" [2002] *Criminal Law Review* 305
- Ormrod D, "Improving the Disclosure Regime" (2003) 7 *International Journal of Evidence and Proof* 102
- Papamatheos A, "Can an inference still be drawn against the Crown for failure to call a material witness?" (2006) 30 *Criminal Law Journal* 24
- Pearse J and Gudjonsson G, "Police Interviewing and Legal Representation: a Field Study" (1997) 8 *Journal of Family Psychiatry and Psychology* 200
- Phillips J, "The Duty of Counsel" (1994) 68 *Australian Law Journal* 834
- Phillips J, "The Eureka Advocates: Part 1" (1990) 32 *Australian Law Journal* 211
- Plater D, "The Development of the Prosecutor's Role in England and Australia with Respect to Disclosure: Partisan Advocate or Minister of Justice?" (2006) 25 *University of Tasmania Law Review* 111
- Plaxton M, "In Search of Prophylactic Rules" (2005) 50 *McGill Law Journal* 127
- Plehwe R, "The Attorney-General and Cabinet" (1980) 11 *Federal Law Review* 12
- Pokorak J, "Rape Victims and Prosecutors: the Inevitable Ethical Conflict of De Facto Client/Attorney Relationships" (2007) 48 *South Texas Law Review* 695
- Pollard C, "A Case for Disclosure" [1994] *Criminal Law Review* 42
- Potts D and Potts A, "The Negro and the Australian Gold Rushes, 1852-1857" (1968) *Pacific Historical Review* 381

Quirk H, "The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work" (2006) 10 *International Journal of Evidence and Proof* 42

Redmayne M, "Criminal Justice Act 2003 (1) Disclosure and its Discontents" [2004] *Criminal Law Review* 441

Regan F, "Rolls Royce or Rundown 1970s Kingswood? Australia's Legal Aid in Comparative Perspective" (1997) 22 *Alternative Law Journal* 225

Richardson P, "Comment," *Criminal Law Weekly*, Issue 27, July 17 2000

Richardson J, "Comment [on *R v Glesson*]," *Criminal Law Weekly*, Issue 39, 3 November 2003

Roberts J, "Too Little, too Late, Ineffective Assistance of Counsel, the Duty to Investigate, and Pre-Trial Discovery in Criminal Cases" (2004) 31 *Fordham Urban Lw Journal* 1097

Rogers S, "The Ethics of Advocacy" (1897) 59 *Law Quarterly Review* 259

Rohan , "Legal aid close to crisis, survey warns" (2003) 100 *Law Society Gazette* 1

Rosenberg M, "The Contribution of Chief Justice Lamer to the Development of the Law of Hearsay" (2000) 5 *Canadian Criminal Law Review* 115

Rosenberg M, "The Attorney-General and the Prosecution Function and the Twentieth Century" (2009) 34 *Queens Law Journal* 813

Samuels A, "Disclosure" (2000) 164 *Justice of the Peace Note* 64

Samuels A, "Prosecution Evidence for the Defence" (1965) *New Law Journal* 193

Samuels A, "Treasury Counsel" (1996) 15 (JAN) *Civil Justice Quarterly* 9

Sanders A, "Core Values, The Magistracy and the Auld Report" (2002) 29 *Journal Law and Society* 324

Sanders A and Young R, "The Ethics of Prosecution Lawyers" (2004) 7 *Legal Ethics* 190

Savage C, "The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial" (1958) 1 *Criminal Law Quarterly* 164

Scrivener A, "Opinion – I didn't want to do it – claims for public interest immunity should be treated far more carefully by the courts in the wake of evidence given to the Scott inquiry" (1994) 91 *Law Society Gazette* 9(2)

Seymour W, "Why Prosecutors Act Like Prosecutors" (1956) 11 *Record of Association of the Bar of the City of New York* 302

Shapray H, "The Prosecutor as a Minister of Justice: a Critical Appraisal" (1969) 15 *McGill Law Journal* 124

- Sharp S, "Disclosure, Immunity and Fair Trials" (1999) 63 *Journal of Criminal Law* 67
- Shepherd I, Justice, "Court Witnesses – A Desirable or Undesirable Encroachment on the Adversary System" (1982) 56 *Australian Law Journal* 234
- Silverman H, QC, "The Trial Judge: Pilot, Participant or Umpire" (1973) 11 *Alberta Law Review* 40
- Simon W, "The Ethics of Criminal Defence" (1993) 91 *Michigan Law Review* 1703
- Singer R, "Forensic Misconduct by Federal Prosecutors-and How It Grew" (1968) 20 *Alabama Law Review* 227
- Sklansky D and Yeazell S, "Comparative Law without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa" (2006) 94 *Georgetown Law Journal* 683
- Smith A, "Can You Be a Good Person and a Good Prosecutor?" (2001) 14 *Georgetown Journal of Legal Ethics* 355
- Smith J, "Commentary [to *R v Bromley Magistrates' Court*]" [1995] *Criminal Law Review* 249
- Smith J, "Commentary [to *R v Wright*]" [2000] *Criminal Law Review* 510
- Smith J, "Commentary [to *R v Cairns*]" [2003] *Criminal Law Review* 403
- Speigelman, P, "Prosecutorial Misconduct in Closing Argument; the Role of Intention in Appellate Review" (1999) 1 *Journal of Practice and Process* 115
- Spigelman J, "The Trust Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 *Australian Law Journal* 29
- Spigelman J, "Public Confidence in the Administration of Criminal Justice," Opening Address, The Australian Association of Crown Prosecutors Conference, Sydney, 5 July 2007, (2007) 19 *Current Issues in Criminal Justice* 219
- Steele W, "Unethical Prosecutors and Inadequate Discipline" (1985) 38 *Southwestern Law Journal* 965
- Stenning P, "'One Blind Man to See Fair Play': The Judge's Right To Call Witnesses" (1974) 24 *Criminal Reports, New Series* 49
- Stephen H, "The Trial of Sir Walter Raleigh: A Lecture Delivered in Connection with the Raleigh Tercentenary Commemoration" (1919) 4<sup>th</sup> Series Vol 2 *Transactions of the RHS* 172
- Taylor C, "Advance Disclosure and the Culture of the Investigator: the Good Idea that never quite caught on?" (2005) 33 *International Journal of the Sociology of the Law* 118
- Taylor C, "What Next for Public Interest Immunity" (2005) 69 *Journal of Criminal Law* 75

- Taylor P and Byrne S, "Reflections on Crown Attorneys and Cross-Examination" (2001) 45 *Criminal Law Quarterly* 303
- Temkin J, "Digging the Dirt: Disclosure of Records in Sexual Assault Cases" (2002) 61 *Cambridge Law Journal* 126
- Temkin J, "Prosecuting and Defending Rape: Perspectives from the Bar" (2000) 27 *Journal of Law and Society* 219
- Traynor R, "Ground Lost and Found in Criminal Discovery in England" (1969) 39 *New York University Law Review* 749
- Turner K, "The Role of Crown Counsel in Canadian Prosecutions" (1962) XL *Canadian Bar Review* 439
- Uviller H, "The Neutral Prosecutor: the Obligation of Dispassion in a Passionate Pursuit" (2000) 68 *Fordham Law Review* 1695
- Walpin G, "Truth, the Jury and the Adversarial System, America's Adversarial and Jury System: more likely to do Justice?" (2003) 26 *Harvard Law Journal of Public Policy* 175
- Watson A, "Witness Preparation in the United States and England and Wales" (2000) 164 *Justice of the Peace Note* 816
- Weatherburn D and Baker J, "Delays in Trial Case Processing: an Empirical Analysis of Delay in the NSW District Criminal Court" (2000) 10 *Journal of Judicial Administration* 25-49
- Weeks J, "No Wrong Without a Remedy: the Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence" (1997) 22 *Oklahoma University Law Review* 833
- Wexler D, "The Development of Therapeutic Jurisprudence: from Theory to Practice" (1999) 68 *Revista Juridica Universidad de Puerto Rico* 691
- WG, "Commentary [to *R v Oliva*]" [1965] *Criminal Law Review* 496
- WG, "Commentary [to *R v Sterk*]" [1972] *Criminal Law Review* 391
- Wheeler F, "Judicial Review of Prerogative Power in Australia: Issues and Prospects" (1992) *University of Sydney Law Review* 432
- White R, "Investigators and Prosecutors or Desperately Seeking Scotland: Reformulation of the Phillips Principle" (2004) 7 *Legal Ethics* 194
- Williams C, "Silence in Australia: Probative Force and Rights in the Law of Evidence" (1994) 110 *Law Quarterly Review* 629
- Williams G, "Advocacy by Police and Justices' Clerks" [1956] *Criminal Law Review* 169
- Williams G, "The Proposals for Hearsay Evidence" [1973] *Criminal Law Review* 76

Winick B and Wexler D, "Drug Treatment Court: Therapeutic Jurisprudence Applied" (2001-2002) 18 *Touro Law Review* 479

Winick B, "Therapeutic Justice and Problem Solving Courts" (2003) 30 *Fordham Urban Law Journal* 1056

Yaroshefsky E, "Wrongful Convictions: Is it Time to take Prosecution Discipline Seriously?" (2004) 8 *University of the District of Columbia/David A Clarke School of Law Review* 275

Zacharias F, "Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice?" (1991) 44 *Vanderbilt Law Review* 45

Zander M, "Mission Impossible" (2006) 156 *New Law Journal* 618

Zellick G, "The Role of Prosecuting Counsel in Sentencing" [1979] *Criminal Law Review* 493

Zucker A, "Public Interest Immunity – A Matter of Prime Judicial Responsibility" (1994) 57 *Modern Law Review* 703

## REPORTS

### ROYAL COMMISSION REPORTS

Royal Commission on Criminal Justice, *Report* (London, HMSO, 1993)

Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (London, HMSO, 1981)

Royal Commission on the Donald Martin Jr Prosecution, *Findings and Recommendations (Vol 1)* (Halifax, The Commission, 1989)

Wood J, Justice, *Royal Commission into the New South Wales Police Service (Vol (2))* (Sydney, Government Printer, 1997)

Wood J, Justice, *Royal Commission into the New South Wales Police Service (Vol 3)* (Sydney, Government Printer 1997)

### LAW REFORM COMMISSION REPORTS

Australian Law Reform Commission, *Domestic Violence (Report No 30)* (Canberra, Australian Government Publishing Service, 1986)

Australian Law Reform Commission, *Review of the Federal Civil Justice System (Discussion Paper No 62)* (Canberra, ALRC, 1999)

Australian Law Reform Commission, *Sentencing of Federal Offenders (Report No 15)* (Canberra, ALRC, 1985)

Law Commission, *Reforming the Rules of General Discovery (Preliminary Paper 45)* (Law Commission, Wellington, 2001)

Law Reform Commission (NSW), *The Right to Silence (Research Report No 10)* (Sydney, Law Reform Commission, 2000)

Law Reform Commission (NSW), *The Right to Silence (Discussion Paper No 41)* (Sydney, Law Reform Commission, 1998)

Law Reform Commission (NSW), *The Right to Silence (Report No 95)* (Sydney, Law Reform Commission, 2000)

Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System of Western Australia: Final Report* (Perth, LRCWA, 1999)

#### OTHER GOVERNMENT REPORTS, REVIEWS & DOCUMENTS

Abraham W QC, *Director of Public Prosecutions Annual Report (South Australia) (2003/2004)* (Adelaide, Office of the DPP, 2004)

Beach B, QC, *Report of the Board of Inquiry into Allegations Against Members of the Victorian Police Force (Volume 1)* (Melbourne, Government Printer, 1978)

Brown T, *Charging and Prosecution Policies in Cases of Spousal Assault: a Synthesis of Research, Academic and Judicial Response: Final Report* (Ottawa, Department of Justice, 2000)

Butterfield A, Justice, *Review of Criminal Investigations and Prosecutions conducted by HM Customs and Excise* (London, HMSO, 2003)

Byrett K and Osborne P, *Criminal Prosecutors Procedure and Practice: International Perspectives, Review of the Criminal Justice System in Northern Ireland* (Belfast, Northern Ireland Office, 2000)

Cory P, *Report of the Inquiry Regarding Thomas Sophonow* (Winnipeg, Manitoba Justice, 2001)

Cowdrey N, QC, *Office of the Director of Public Prosecutions (New South Wales) Annual Report 2009-2010* (Sydney, Office of the DPP, 2010)

Criminal Justice Review Group, *Review of the Criminal Justice Process in Northern Ireland* (Belfast, Northern Ireland Office, 2000)

Crown Prosecution Service, *Code for Crown Prosecutors* (London, CPS, 2004)

Dunford J, QC, *Report of the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mallard, and Other Related Matters* (Perth, Crime and Misconduct Commission, 2008)



Fisher H, Sir, *Report of an Inquiry into the Circumstances leading to the Trial of Three Persons on Charges Arising out of the Death of Maxwell Confait and The Fire at 27 Doggett Road, London, SE6*, "Confait Report" (London, HMSO, 1977)

Glidewell I, *The Review of the Crown Prosecution Service: A Report* (London, HMSO, 1998)

Goldsmith P, Lord, *Pre-Trial Witness Interviews by Prosecutors Report* (London, Office of the Attorney-General, 2004)

Gower J, QC and Hammond A, Sir, *Review of Prosecutions Conducted by the Solicitor's Office of HM Customs and Excise* (London, Office of the Attorney-General, 2000)

Her Majesty's Crown Prosecution Service Inspectorate, *Report of the Thematic Review of the Disclosure of Unused Material* (London, HMCPS Inspectorate, 2000)

Her Majesty's Crown Prosecution Service Inspectorate, *A Thematic Review of the Duties of Disclosure of Unused Material* (London, HMCPS Inspectorate, 2008)

House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (London, Great Britain Parliament: House of Commons, 2008)

Her Majesty's Crown Prosecution Service Inspectorate, *Report of the Thematic Review of the Quality of Prosecution Advocacy and Case Presentation* (London, HMCPS Inspectorate, 2009)

Independent Commission Against Corruption, *Report on Investigation into the Use of Informers (Volume 1)* (Sydney, ICAC, 1993)

James A, *The distribution of criminal business between the Crown Court and Magistrates' Courts* (London, HMSO, 1976)

Kaufman F, QC, *Report of the Commission on Proceedings Involving Guy Paul Morin (Vol 1 and 2)* (Toronto, Attorney-General of Ontario, 1998)

Lidston K (ed), *Prosecutions by Private Individuals and Non-Police Agencies (Royal Commission on Criminal Procedure (Research Study No 10))* (London, HMSO, 1980)

Martin B, et al, *Working Party on Criminal Trial Procedure: Report* (Canberra, Attorney-General's Department, 1999)

McGrath J, *Office of the Director of Public Prosecutions for Western Australia: Annual Report 2009/2010* (Perth, Office of the DPP, 2010)

Moynihan M, QC, *Review of the Civil and Criminal Justice System in Queensland* (Brisbane, Queensland Government, 2008)

Ministry of Justice, *Judicial and Court Statistics 2007* (London, Ministry of Justice, 2008)

Narey M, *Review of Delay in the Criminal Justice System* (London, Home Office, 1997)

National Audit Office, *Criminal Justice: Working Together* (London, National Audit Office, 1999)

Norris G, *Police Procedures Relating to the Investigation of Crime (Part 1)* (Melbourne, Government Printer, 1978)

Pallaras S, QC, *Annual Report of the Director of Public Prosecutions (South Australia) 2007-2008* (Adelaide, Office of the DPP, 2008)

Plotnikoff J and Woolfson R, *A Fair Balance? Evaluation of the Operation of the Disclosure Law (RSD Occasional Paper No 76)* (London, Home Office, 2001)

Rapke J, QC, *Annual Report of the Director of Public Prosecutions (Victoria) 2007-2008* (Melbourne, Office of the DPP, 2008)

Rapke J, QC, *Annual Report of the Director of Public Prosecutions (Victoria) 2009-2010* (Melbourne, Office of the DPP, 2010)

Rolfe P, QC, *Annual Report of the Director of Public Prosecutions (South Australia) 1999-2000* (Adelaide, Office of the DPP, 2000)

Scrutiny of Acts and Regulation Committee, *The Right to Silence: Report* (Melbourne, Parliament of Victoria, 1999)

Shorter Trials Committee, *Report on Criminal Trials* (Canberra, AIJA, 1985)

Vennard J, *Contested Trials in Magistrates' Courts (Home Office Research Study No 71)* (London, HMSO, 1982)

Wedderburn M and Balco J, *Managing Trial Court Delay: An Analysis of Trial Case processing in the NSW District Criminal Court* (Sydney, NSW Bureau of Criminal Statistics and Research, 2000)

Zander M and Henderson P, *Crown Court Study (Royal Commission on Criminal Justice Research Study No 19)* (London, HMSO, 1993)

## CASES

*A v UK* [2009] ECHR 301

*Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91

*Al-Khawaja & Tahery v United Kingdom* [2009] ECHR 110

*Attorney General v Knowles* [2002] JLR Note 38

*Attorney-General's Reference (No 1 of 1990)* [1992] QB 630

*Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91

*Attorney-General's Reference (No 80 and 81 of 1999)* [2000] Cr App R (S) 138

*Beecham Group Ltd v Bristol-Myers Co* [1979] VR 273

*Blatch v Archer* (1774) 1 Cowp 63

*Borgers v Belgium* (1991) 15 EHRR 92

*Brady v Maryland* (1963) 373 US 83

*Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495

*Cannon v Tahche* (2002) 5 VR 317

*Chalal v United Kingdom* (1997) 23 EHRR 413

*Clarkson v DPP* [1990] VR 745

*Clyne v NSW Bar Association* (1960) 104 CLR 186

*Collier v Hicks* (1823) 2 B & A 663

*Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55

*Cox v Coleridge* (1822) 1 B & C 37

*Boyce v Nunn* (1997) 138 FLR 475

*Crown Prosecution Service Durham v CE* [2006] EWCA Crim 1410

*Cunliffe v Law Society of British Columbia* (1984) 11 DLR (4<sup>th</sup>) 280

*Dallison v Caffery* [1964] 2 All ER 610

*Dix v Attorney-General* [2002] AJ No 784

*Donnelly v De Christofaro* (1974) 416 US 637

*Doorsen v Netherlands* (1996) 22 EHRR 330

*Douglas Narayan & Partners v Khan* (1998) PNLR 535

*DPP v Chow* (1992) 63 A Crim R 316

*DPP v Humphreys* [1977] AC 1

*DPP v Ivanovic (Ruling No 3)* [2003] VSC 389

*DPP v Jensen* [2007] VSC 77

*DPP v Nair* (2009) 236 FLR 239

*DPP v Special Criminal Court & Ward* [1999] 1 IR 60

*DPP v Wood, The Times*, 8 February 2006 and [2005] EWHC Admin 2986

*DPP (NSW) v Webb* (2001) 52 NSWLR 341

*Duckett v Mullin* (2002) 306 F (3d) 982

*Duncan v Toms* (1887) 56 LJMC 81

*Duncombe-Walls v Police* (1998) 197 LSJS 398

*Eate v Police* (2004) 236 LSJS 376

*Edwards v United Kingdom* (2003) 15 BHRC 189

*Edwards & Osakwe v DPP* [1992] Crim LR 576

*El Dabbah v Attorney-General of Palestine* [1944] 2 All ER 139

*Elder v Carter, ex parte Slide & Spur Gold Mining Discovery Co* (1890) 25 QBD 194

*Elguzouli-Daf v Commissioner of Police for the Metropolis* [1995] QB 335

*Environment Agency v Stanford*, unreported, Divisional Court, 30 June 1998, No CO/4625/97

*ES v Northampton Crown Court* [2010] EWHC Admin 723

*Evans v Chief Constable of Surrey* [1988] QB 588

*Ex parte Nichols* (1839) 1 Legge 123

*Ex parte Lloyd* [1830] Mont 70

*Foucher v France* (2000) 30 EHRR 480

*Francis v Franklin* (1970) 471 US 307

*Fuller v Field* (1995) 78 A Crim R 211

*Giannerelli v Wraith* (1988) 165 CLR 543

*Gleadhill v Huddersfield Magistrates Court* [2005] EWHC Admin 2283

*Graham v Police* (2001) 122 A Crim R 152

*Grimwade v Victoria* (1997) 90 A Crim R 526

*Hall v United States* (1969) 419 F (2d) 582

*Haraguchi v Superior Court* (Supreme Court of California, 12 May 2008, No S148207)

*Haw Tua Tau v Public Prosecutor* [1982] AC 136

*Herring v New York* (1975) 422 US 853

*HM Advocate v Sinclair* [2005] UKPC D2 (*The Times*, 1 June 2005)

*Hoem v Law Society of British Columbia* (1985) 20 CCC (3d) 239

*Holmden v Biter* (1987) 47 SASR 509

*Houston v Grannage* (1989) 42 A Crim R 446

*Hughes v DPP* [2003] EWHC Admin 2470

*Imbler v Patchman* (1976) 424 US 409

*Jago v District Court (NSW)* (1989) 168 CLR 23

*Jasper & Fitt v United Kingdom* (2000) 30 EHRR 441

*Jolly v DPP* [2000] Crim LR 471 (otherwise unreported); 31 March 2000, Divisional Court, No CO/1193/99

*Jones v Dunkel* (1959) 101 CLR 298

*Jones v National Coal Board* [1957] 2 QB 55

*Kaufman v Belgium* (1986) 50 DR 98

*Krieger v Law Society (Alberta)* (1997) 149 DLR (4th) 92

*Lang v Reid* [1916] NZLR 1186

*Langtree v Trenerry* (1999) 152 FLR 117

*Luca v Italy* [2003] 36 EHRR 46

*M (K) v Desrochers* (2000) 52 OR (3d) 742

*MacDowell v MacDougall*, 16 November 1841 (*Colonial Times*, 23 November 1841)\

*McLennan v Boyer* (1961) 106 CLR 95

*MacMillan Inc v Bishopsgate Investment Trust* [1993] 4 All ER 998

*Maddison v Goldrick* [1975] 1 NSWLR 557

*Martin v Visser* [2000] TASSC 173

*Maxwell v DPP* (1934) 24 Cr App R 152

*McCarty v State* (1998) 765 P (2d) 1215

*Mohammed v State* [1999] 2 WLR 552

*Malcolm v DPP* [2007] EWHC Admin 363

*Montague v Dudman* (1751) 2 Ves Sen 396

*Morris v Director of SFO* [1993] Ch 372

*Mortgage Express Ltd v S Newman & Co* [2000] PNLR 298

*Moss v Brown* [1979] 1 NSWLR 114

*Murphy v DPP* [2006] EWHC 1753

*Nelles v Ontario* [1989] 2 SCR 170

*Nichia Corp v Argos Ltd* [2007] EWCA Civ 7412

*Ninness v Walker* (1998) 143 FLR 239

*O'Shea v Bandiera* (1968) 62 QJPR 138

*Paxton v State* (1999) 199 F (3d) 1197

*People v Blue* (2000) 724 NE (2d) 920

*People v P* [2003] 3 IR 550

- People v Ray* (1984) 467 NE (2d) 1078
- Petition of Di Joseph* (1958) 349 Pa 19
- PG & JH v United Kingdom* [2002] Crim LR 308
- Police v Kyriacou* (2009) 103 SASR 243
- Police v Pakrou* [2008] SASC 364
- Police v Sherlock* [2009] SASC 64
- Proulx v Quebec Attorney-General* 159 CCC (3d) 225
- 
- R v Absolom* [1828] NSWSupC 5 (*Australian*, 13 February 1828)
- R v Adam* (2001) 207 CLR 96
- R v Adams* [2007] EWCA Crim 1
- R v Adaway*, *The Times*, 22 November 2004
- R v Agar* [1990] 2 All ER 442
- R v Agostino* (1952) 102 CCC 112
- R v Akles*, Central Criminal Court, 14 January 1784, No T17840114-80
- R v Albu* (1995) 84 A Crim R 11
- R v Alderson* [1840] NSWSupC 37 (*Sydney Herald*, 3 August 1840)
- R v Alfrey* [2005] EWCA Crim 3232
- R v Alibhai & Ors* [2004] EWCA Crim 681
- R v Alister* (1984) 154 CLR 404
- R v Allen and Ors* (1993) 66 A Crim R 376
- R v Anderson* (1991) 53 A Crim R 421
- R v Anderson, Davis & Ors* [1832] NSWSupC 8 (*Sydney Gazette*, 17 April 1832)
- R v Andrews* [2010] SASC 5
- R v Apostilides* (1983) 11 A Crim R 381 (Court of Appeal (Vic))
- (1984) 154 CLR 563 (High Court of Australia)
- R v AR* (1994) 94 CCC (3d) 168

*R v Armstrong* [1995] Crim LR 342 (otherwise unreported); Court of Appeal, February 24 1995, No 2047Y5, Transcript: John Larking

*R v Armstrong* [1998] 4 VR 533

*R v Arviv* (1985) 19 CCC (3d) 395

*R v Ashton, Farmer & Randall* [2003] TASSC 140

*R v Atkinson* [1978] 2 All ER 460

*R v Attallah* [2005] NSWCCA 277

*R v Azmy* (1996) 7 Med LR 415

*R v Azzopardi* (2001) 205 CLR 50

*R v B* [2000] Crim LR 50

*R v B (RB)* (2001) 152 CCC (3d) 437

*R v Badgerow* [2008] CanLII 15894

*R v Bain* [1992] 1 SCR 91

*R v Bakash* [1958] AC 157

*R v Baker* [1996] Crim LR 55

*R v Baldwin, The Times*, 3 May 1978

*R v Ballack & Ors*, unreported, Isleworth Crown Court, 17 November 1999, No T 1999060

*R v Balmforth* [1992] Crim LR 825 (otherwise unreported); Court of Appeal, 12 June 1992, Transcript: Martin Welsh Cherer

*R v Banks* [1916] 2 KB 621

*R v Barber & Ors*, Central Criminal Court (*The Courier*, 12 June 1847)

*R v Barker*, Central Criminal Court, 20 January 1824 (*The Times*, 21 January 1824)

*R v Bartkowski & Ors* [2005] BCSC 782

*R v Barley* (1847) 2 Cox CC 191

*R v Barton* (1980) 147 CLR 75

*R v Barrett* [2005] VSC 31

*R v Basha* (1989) 39 A Crim R 337



- R v Bathgate* (1946) 46 SR (NSW) 281
- R v Bazley* (1986) 21 A Crim R 19
- R v Beamish* [2005] WASCA 62
- R v Beare* [1988] 2 SCR 387
- R v Beaney* (1866) 3 W W & a'B (L) 69
- R v Beckett, The Mercury*, 29 January 1859
- R v Beezley* (1830) 4 Car & P 220
- R v Beglin* [2003] 1 Cr App R (S) 88 (21)
- R v Belaney* (1844) 20 CCC Sess P 441
- R v Belbin, Mercury*, 14 & 17 February 1914
- R v Belmarsh Magistrates' Court, ex parte Watts* [1999] 2 Cr App R 188
- R v Bendetto & Labrador* [2003] 1 WLR 1545
- R v Bennett & Morris*, Central Criminal Court, 5 June 1782, No T 17820605-1
- R v Bentley* [2001] 1 Cr App R 21
- R v Berens* (1865) 4 F & F 842
- R v Berry* [1992] 2 AC 364
- R v Beydag*, unreported, Court of Appeal (Vic), 25 November 1996, No 150/1996
- R v Billy* [1840] NSWSupC 78 (*Sydney Herald*, 5 November 1840)
- R v Bingle & Were* [1837] NSWSupC 25 (*Sydney Herald*, 15 May 1837)
- R v Birchall (The Age)*, 24 July 1872)
- R v Birmingham & Ors* [1992] Crim LR 117
- R v Birmingham Crown Court, ex parte Richetts* [1991] RTR 105
- R v Bishop* [2003] EWCA Crim 3682
- R v Beckford* (1996) 1 Cr App R 94
- R v Beibia*, unreported, NSW Court of Criminal Appeal, 27 May 1982, Transcript, p 4-5
- R v Benbrika* [2007] VSC 283
- R v Benson* (Sydney Gazette, 27 January 1825)

- R v Black* (1990) 55 CCC (3d) 421
- R v Blackhurst*, *The Times*, 23 August 1823
- R v Blackledge & Ors* [1996] 1 Cr App R 326
- R v Blastland* [1986] AC 41
- R v Blewitt* (1988) 80 ALR 353
- R v Blight & Ors* [1999] Crim LR 426
- R v Boatman* [1832] NSWSupC 4 (*Sydney Gazette*, 25 February 1832)
- R v Bodle* (1833) 6 Car & P 186
- R v Bogle* [1842] TASSupC 32 (*True Colonist*, 16 December 1842)
- R v Bolden*, *Port Philip Patriot*, 6 December 1841
- R v Bolianatz* (1987) 20 BCLR (2d) 304
- R v Bolton Justices; ex parte Scally* [1991] 2 All ER 619
- R v Boucher* [1955] SCR 16
- R v Bourimech* [2002] EWCA Crim 2089
- R v Bow Street Magistrates' Court, ex parte Finch* [1999] EWHC Admin 527
- R v Bradish & Hall* [2004] EWCA Crim 1340
- R v Bradshaw*, unreported, 13 May 1997, Court of Criminal Appeal (WA), No 970228, Supreme Court Library, Transcript, p 9-11
- R v Brady* [2004] EWCA Crim 2230
- R v Brent* [1973] Crim LR 275
- R v Bretton* (1996) 189 AR 60
- R v Brice*, Central Criminal Court, 25 June 1761
- R v Brice* (1819) 2 B & Ald 606
- R v Broadhead & Ors*, *Colonial Times*, 2 September 1825
- R v Bromley Magistrates' Court, ex parte Smith* [1995] 4 All ER 146
- R v Brooks* (2001) 153 CCC 533
- R v Brown*, Central Criminal Court, 30 August 1727, T 17270830-23

- R v Brown* (1951) 2 WWR (NS) 395
- R v Brown* [1997] 3 All ER 769
- R v Brown* [1998] AC 367
- R v Brown & Brown* [1997] 1 Cr App R 112
- R v Browning* [1995] Crim LR 227
- R v Brushett* [2001] Crim LR 471
- R v Bryan* (*Maitland Mercury*, 20 September 1848)
- R v Bryant* [1979] QB 108
- R v Bryant* [2005] EWCA Crim 2079
- R v Bryant & Dickson* (1946) 31 Cr App R 146
- R v Buckland* [1977] 2 NSWLR 452
- R v Bull* (1839) 9 Car & P 22
- R v Buller* [2002] WASC 90
- R v Burdett* (1820) 4 B & Ald 95
- R v Burdett & Ors*, *Sydney Morning Herald*, 17 July 1844
- R v Burgess* [1824] TASSupC 28 (*Hobart Town Gazette*, 10 December 1824)
- R v Burnett & Ors*, unreported, Southwark Crown Court, 10 May 2010
- R v Burrows*, Central Criminal Court, 15 September 1790, No T 1790915-109
- R v Burrows*, York Summer Assizes, 17 July 1823 (*The Times*, 21 July 1823)
- R v Button* (2002) 25 WAR 382
- 
- R v C, ex parte DPP* [1995] 1 Cr App R 136
- R v C & Ors* [2001] EWCA Crim 1529
- R v C & Ors* [2006] SASC 158
- R v Caccamo* (1976) 54 DLR (3d) 685
- R v Cairns, Zaidi and Chaudhary* [2003] Crim LR 403 and [2003] 1 Cr App R 38
- R v Callaghan* (1993) 70 A Crim R 350

- R v Carter* (1997) 19 WAR 8
- R v Calucci* (1861) 3 F & F 103
- R v Cam & Denner* [1832] TASSupC 19 (*Tasmanian*, 7 April 1832)
- R v Campbell*, *Colonial Times*, 1 August 1843
- R v Campbell* (1982) 31 CR (3d) 166
- R v Campbell* (1983) 2 CCLS 82
- R v Campbell* [2009] All ER (D) 119
- R v Cannon*, unreported, Court of Appeal, 30 January 2005, Transcript: John Larkin
- R v Carpenter* (1844) 1 Cox CC 72
- R v Carroll* (2002) 213 CLR 635
- R v Casey and Wells* (1985) 20 A Crim R 191
- R v Cassell* (2000) 201 CLR 189
- R v Cassidy* (1858) 1 F & F 79
- R v Causby* [1984] Tas R 54
- R v Causevic* [2008] NSWCCA 238
- R v Cavanagh & Shaw* [1972] 2 All ER 704
- R v Central Criminal Court, ex p Director of Revenue and Customs Prosecutions* [2006] EWHC Admin 3064
- R v Chaaban* [2003] EWCA Crim 1012
- R v Chamandy* [1934] OR 208
- R v Chantry & Harris* (*Colonial Times*, 29 May 1846)
- R v Chaplin* [1995] 1 SCR 727
- R v Chapman* (1838) 8 Car & P 558
- R v Charest* (1990) 57 CCC (3d) 312
- R v Charette* (1982) 67 CCC (2d) 357
- R v Charlton* [1972] VR 758
- R v Chief Constable of West Midlands, ex parte Wiley* [1994] 3 All ER 420

- R v Childs*, *The Times*, 30 November 2002
- R v Chorley Justices, ex parte DPP* [2006] EWHC Admin 1795
- R v Chin* (1985) 157 CLR 671
- R v Ciseau* [1994] QCA 473
- R v Clark* (1993) 171 LSJS 133
- R v Clark* [2003] 2 FCR 447
- R v Clark* [2004] OJ No 195
- R v Clarke* (1931) 22 Cr App R 58
- R v Clarke & Hewins*, unreported, Court of Appeal, 15 February 1999, No 97/4822/W3, Transcript: Smith Bernal
- R v Clayton & Ors* (*Colonial Times*, 6 July 1827 and *Hobart Town Gazette*, 23 June 1827)
- R v Cleghorn* [1967] 1 All ER 996
- R v Collard* [1837] NSWSupC 1 (*The Australian*, 7 February 1837)
- R v College* (1681) 8 St Tr 549
- R v Collister & Warhurst* (1955) 39 Cr App R 104
- R v Colquhoun* [2009] SASC 138
- R v Combined Court at Stafford* [2006] EWHC Admin
- R v Connoloy & Moran*, Hertford Assizes, 5 March 1824 (*The Times*, 6 March 1824)
- R v Connor* (1845) 1 Cox CC 233
- R v Cook* (1996) 107 CCC (3d) 334 (New Brunswick Court of Appeal)
- R v Cook* (1997) 146 DLR (4<sup>th</sup>) 437 (Supreme Court of Canada)
- R v Cooper* [1969] 1 QB 267
- R v Cooper & McMahon* [2003] EWCA Crim 2257
- R v Cordell* [1838] NSWSupC 39 (*Australian*, 4 May 1838)
- R v Cormack* [2004] EWCA Crim 1117
- R v Counsel* (*Wasted Costs Order No 5 of 1997*), *The Times*, 7 September 1999
- R v Courvoisier*, Central Criminal Court, 18, 19 and 20 June 1840, No T18400615-1629 (*The Times*, 19 June 1840 and *Sydney Gazette*, 24 October 1840)

- R v Couzens & Frankel* [1992] Crim LR 822
- R v Cox* (*Colonial Times*, 2 June 1854)
- R v Cox (No 3)* [2005] VSC 249
- R v CPK*, unreported, Court of Criminal Appeal (NSW), 21 June 1995, No 60330 of 1994
- R v Cunningham*, Central Criminal Court, 11 January 1797, No 17970111-5
- R v Curragh Inc* (1997) 113 CCC (3d) 481
- R v Curtis*, 15 September 1784, Central Criminal Court, No 1784040601-1
- R v Cushway* (1968) 62 QJPR 90
- 
- R v Dalton & Kelly* (*Launceston Examiner*, 9 April 1853)
- R v Damic* (1982) 6 A Crim R 35
- R v Daly* (1992) 57 OAC 70
- R v Day* (2000) 115 A Crim R 80
- R v Davis & Ors* [1993] 1 WLR 619
- R v Davis & Ors* [2006] EWCA 1155
- R v Davidson* [1841] NSWSupC 43 (*Sydney Herald*, 1 May 1841)
- R v Davydov* (1992) 13 CR (4th) 67
- R v Day & Campbell* (*Colonial Times*, 17 May 1850)
- R v DDR* [1998] 3 VR 580
- R v Dedam* [1991] Carswell NB 257
- R v De Jesus* (1986) 61 ALJR 1
- R v Deriz* (1999) 109 A Crim R 329
- R v Devenish* [1969] VR 737
- R v Dietrich* (1992) 177 CLR 292
- R v Donnison* (*Sydney Herald*, 2 March 1837)
- R v Doran*, unreported, Bristol Crown Court, 6 July 1999
- R v Dorrington*, Central Criminal Court, 10 September 1788, No T17880910-46

- R v Doubtfire* [2000] EWCA Crim 101
- R v Douglas & Ors* [1834] NSWSupC 81 (*Sydney Gazette*, 13 September 1834)
- R v Dowding* (2000) 159 FLR 204
- R v DPP, ex parte Beaney & King* [1999] EWHC Admin 432
- R v DPP, ex parte C* [1995] 1 Cr App R 136
- R v DPP, ex parte C*, unreported, Divisional Court, No Co1450/99, 10 March 2000
- R v DPP, ex parte Jones* [2000] Crim LR 858
- R v DPP, ex parte Joseph* [2001] Crim LR 489
- R v DPP, ex parte Lee* [1999] 2 All ER 737
- R v DPP, ex parte Stacey*, unreported, Divisional Court, No CO/714/99, 20 October 1999, Transcript
- R v Driscoll* (1977) 137 CLR 517
- R v Dudko* (2002) 132 A Crim R 371
- R v Duffy* (1847) 1 Cox CC 367
- R v Duffy, O'Connell & Ors* (1847) 1 Cox CC 386
- R v Dunk & Ors* [1995] Crim LR 137
- R v Dupas* [2010] HCA 20
- R v Durie* [1839 TASSupC 35 (*Cornwall Chronicle*, 12 October 1839)
- R v Dye, The Times*, 19 December 1991
- R v Dyers* (2002) 210 CLR 285
- R v Early & Ors* [2003] 1 Cr App R 19
- R v Easom* (1981) 28 SASR 134
- R v Easterday* (2003) 143 A Crim R 154
- R v Eastman* (1995) 84 A Crim R 118
- R v Eastwood & Boland* [1973] VR 709
- R v Ebcin & Ors* [2005] EWCA Crim 168

- R v Edwards*, Warwick Assizes (*The Times*, 5 August 1820)
- R v Edwards*, Worcester Crown Court, 11 March 1828 (*The Times*, 14 March 1828)
- R v Edwards* [1996] 2 Cr App R 345
- R v Edwards* [2009] HCA 20
- R v Edwards & Ors* (1848) 3 Cox CC 82
- R v El Treki* [2000] 8 Archbold News 3
- R v Elias*, Central Criminal Court, 25 February 1789, No T 17890225-101
- R v Elliott* [2003] OJ 4694
- R v Elliott*, Central Criminal Court, 11 July 1787, No T17870711-41
- R v Epping and Harrow Justices, ex parte Massaro* [1973] 1 All ER 1011
- R v Evans* [1824] TASSupC 21 (*Hobart Town Gazette*, 12 November 1824)
- R v Evans* [1964] VR 717
- R v Eyres*, Central Criminal Court, 9 January 1799, No 179970111-5
- R v Farr* (*Colonial Times*, 6 June 1854)
- R v Farrell & Moore* (1848) 3 Cox CC 140, n (a)
- R v Farrell and Others* NSW Select Cases (Dowling 1828-1844) 136 (see also *Sydney Gazette*, 26, 28 and 30 July 1831)
- R v Farquharson* [2009] VSCA 307
- R v Fergus* [1994] 1 Cr App R 313
- R v Filmer* [2006] EWHC Admin 3450
- R v Finland* (1959) 125 Can CC 190
- R v Finta* [1994] 1 SCR 701
- R v Flanders* (*Mercury*, 5 June 1862)
- R v Flannigan* [1838] NSWSupC 40 (*Sydney Gazette*, 3 May 1838)
- R v Flatley* (1842) Ir Cir Pep 445
- R v Fletcher* [1989] CarswellNS 639



- R v Foley* (1984) 13 A Crim R 29
- R v Foley & Pratt*, *Colonial Times*, 13 May 1834
- R v Fonton*, Central Criminal Court, 15 July 1790, No T 17900915-37
- R v Foxford* [1974] NI 181
- R v Francis* (2004) 145 A Crim R 233
- R v Franklin*, Hertford Assizes, 5 March 1830 (*The Times*, 6 March 1830)
- R v Franklyn* [1993] 1 WLR 852
- R v Franks* (1991) 67 CCC (3d) 280
- R v Freer & Weekes* [2004] QCA 97
- R v Fuller* [1966] NZLR 865
- R v G* [2007] VSC 503
- R v G & B* [2004] 1 WLR 2932
- R v GAS* (2004) 217 CLR 198
- R v Gallagher* [1974] 1 WLR 1204
- R v Garlick*, Central Criminal Court, 30 October 1826, *The Times*, 31 October 1826
- R v Garner* [1958] Crim LR 827
- R v Garofalo* [1999] 2 VR 625
- R v Gelden & Davis* (*Hobart Town Gazette*, 18 June 1824)
- R v Gell & Ors* [2003] EWCA Crim 123
- R v George Maxwell Ltd* [1980] 2 All ER 99
- R v Gerard* (*Murray's Review*, 28 July 1843 and *Hobart Town Courier*, 21 July 1843)
- R v Gibbons* [1947] 1 DLR 45
- R v Gibson* [2002] NSWCCA 401
- R v Gill* (1987) 39 CCC (3d) 506
- R v Gillam*, *The Times*, 11 April 1828
- R v Gillard & Preston* (1999) 76 SASR 76

- R v Gillingham* (1910) 5 Cr App R 187
- R v Gillis* (1994) 12 WAR 493
- R v Gingras* (1990) 120 AR 300
- R v Giroux* (2002) 166 CCC (3d) 427
- R v Gleeson* [2004] 1 Cr App R 406
- R v Glennon* (1992) 173 CLR 592
- R v Glennon* [1999] EWCA Crim 1104
- R v Gonez* [1999] All ER (D) 674
- R v Goncalves* (1997) 99 A Crim R 193
- R v Gonzales* [2007] NSWCCA 321
- R v Goodere* (1741) 17 St Tr 1003
- R v Gorrington*, Horsham Assizes, 24 March 1824 (*The Times*, 25 March 1824)
- R v Gouldham* [1970] WAR 119
- R v Governor, The Age*, 23 & 24 November 1900
- R v Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281
- R v Grace* (1846) 2 Cox CC 101
- R v Grafton* [1992] 4 All ER 4 609
- R v Grant* [2005] 2 Cr App R 28
- R v Grant* [2007] 4 WWR 543
- R v Grant-Taylor, ex parte Johnson* [1980] Qd R 387
- R v Grassby* (1989) 168 CLR 1
- R v Grays Justices, ex parte Tetley* (1980) 70 Cr App R 11
- R v Greary, Sydney Gazette*, 18 August 1821
- R v Greater Manchester Police, ex parte Fairclough*, unreported, Divisional Court, 1 February 1984, No CO /402/83, Transcript.
- R v Greenslade* (1870) 11 Cox CC 412
- R v Greenwood* [2004] EWCA Crim 1388

- R v Grey* (2000) 111 A Crim R 322 (Court of Criminal Appeal (NSW))
- R v Grey* (2001) 184 CLR 593 High Court of Australia)
- R v Griffis* (1996) 91 A Crim R 203
- R v Griffiths*, *Hobart Mercury*, 25 & 26 October 1865
- R v Grondkowski & Malinowski* [1946] KB 369
- R v Guney* [2003] EWCA Crim 1502
- R v Gunthorp* [2006] 3 NZLR 433
- R v Guillem* [1837] TASSupC 2 (*Tasmanian*, 17 March 1837)
- R v Gurney* (1869) 11 Cox CC 414
- R v GW & EW* [1997] 1 Cr App R 166
- 
- R v H* [1997] 1 Cr App R 176
- R v H* [2004] 2 AC 134
- R v H (J)* (1996) 10 OTC 69
- R v Hackett* [2003] BCPC 479
- R v Hadley & Ors* [2006] EWCA Crim 2544
- R v Haig* [2006] 22 CRNZ 814
- R v Hall* (1959) 43 Cr App R 29
- R v Halloran & Waldron* [1834] NSWSupC 85 (*Sydney Gazette*, 7 August 1834)
- R v Hamiguchi* [1908] Qd SR 224
- R v Hankey* [2008] CanLII 68105
- R v Hanslowe* (*Mercury*, 26 January 1859)
- R v Hardy*, Central Criminal Court, 23 February 1785, No T17850223-15
- R v Hardy*, Central Criminal Court, 8 May 1799, No T17990508-50
- R v Haringey Justices, ex parte DPP* [1996] 1 All ER 828
- R v Harms* [2002] QCA 121
- R v Harper and Ahtty*, unreported, Belfast Crown Court, 6 December 1994, Transcript

- R v Harrie* (1833) 6 Car & P 105
- R v Harris* (1882) CCC Sec Pap xcv 525
- R v Harris* [1927] 2 KB 587
- R v Harris* [2010] 2 WWR 477
- R v Harry, ex p Eastway* (1985) 39 SASR 203
- R v Hart*, Central Criminal Court, 26 February 1783, T 17830226-15
- R v Hawdon* (*Sydney Morning Herald*, 11 January 1845)
- R v Hawkins*, unreported, Central Criminal Court, 1896
- R v Hayes*, *The Age*, 20 March 1855; 21 March 1855 and *The Argus*, 20 March 1855; 21 March 1855
- R v Heggert* [2001] 4 Archbold News 2
- R v Helpard* (1979) 49 CCC (2d) 35
- R v Hereford Magistrates' Court, ex parte Rowlands* [1998] QB 110
- R v Heston-Francois* [1984] 1 All ER 785
- R v Hezell* (1844) 1 Cox CC 384
- R v Hickman* (*The Times*, 7 December 1984)
- R v Hiefe* (*Sydney Herald*, 16 February 1841)
- R v Higgins* [2002] EWCA Crim 336
- R v Higgins* (1994) 71 A Crim R 429
- R v Higgins*, unreported, Court of Criminal Appeal (Vic), 2 March 1994
- R v Higgins* [1996] 1 FLR 137
- R v Higgs & Higgs*, Oxford Assizes (*The Times*, 8 March 1824)
- R v Hill & McKay* [1841] TASSupC 18 (*Hobart Town Advertiser*, 30 April 1841 and *The Courier*, 27 April 1841)
- R v Hilton* [2003] EWCA Crim 761
- R v Hitchcock & Ors* [1833] NSSWSupC 114 (*Sydney Gazette*, 10 & 12 December 1833)
- R v Hobson* (1823) 1 Lew CC 261
- R v Hogan*, Central Criminal Court, 11 January 1786, No 17860111-1

- R v Holchester* (1865) 10 Cox CC 227
- R v Holland* (1792) 4 TR 691
- R v Holland* (1896) 30 Ir Law Times 395
- R v Hollinghead*, Huntingdon Assizes, 13 March 1830 (*The Times*, 8 March 1830)
- R v Horan* [1828] NSWSupC 62 (*The Australian*, 22 August 1828)
- R v Horncastle* [2009] EWCA Crim 964
- R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] AC 42
- R v Hounsham & Ors* [2005] EWCA Crim 1366
- R v House* (1921) 16 Cr App R 49
- R v Howell* [2003] EWCA Crim 486
- R v Howes* [2007] All ER (D) 99
- R v Howick* [1970] Crim LR 403
- R v Hubbard & Ors*, Central Criminal Court, 29 March 1792, No 17920329-26
- R v Hume* (1901) 11 QLJ (NC) 31
- R v Humphreys*, unreported, Maidstone Crown Court, *The Times*, 12 February 2000
- R v Huntley*, unreported, Central Criminal Court, 5 November 2003
- R v Hutchinson* (1988-1990) 53 SASR 587
- 
- R v Idaewer* [2005] EWCA Crim 2995
- R v Inland Revenue Commissioners, ex parte Mead & Cook* [1993] 1 All ER 772
- R v Innes*, Central Criminal Court, 10 December 1788, No T17881210-52
- R v Ikram & Paveen* [2008] Crim LR 912
- 
- R v J (No 2)* [1998] 3 VR 602
- R v J (A)* [2010] VSCA 331
- R v JAK* [1992] Crim LR 30
- R v Jack & Dick* [1826] TASSupC 9 (*Colonial Times*, 2 June 1826)

- R v Jackson* [2000] Crim LR 377
- R v Jackson* (2005) 202 CCC (3d) 228
- R v Jacques*, Central Criminal Court, 10 July 1790, No T 17900710-1
- R v James* [2002] EWCA Crim 1119
- R v James & Pittaway*, Oxford Assizes (*The Times*, 8 August 1824)
- R v Jamieson* [1827] NSWSupC 31 (*Sydney Gazette*, 18 May 1827)
- R v Jamieson* (1992) 60 A Crim R 68
- R v Jannison & Kennedy* (1982) 62 CCC (2d) 481
- R v Japaljarra* (2002) 134 A Crim R 261
- R v Jenkins* [1998] Crim LR 411
- R v Jenkins*, unreported, Court of Appeal, 21 December 1999, No 98/4720/W3, Transcript: Smith Bernal.
- R v Jensen* [2009] VSCA 266
- R v Jephson*, Cambridge Assizes, 23 July 1823 (*The Times*, 25 July 1823)
- R v Jewell & Wiseman* (1981) 54 CCC (2d) 286
- R v Jisl* [2004] EWCA Crim 696
- R v Job Smith* (*Mercury*, 13 May 1875)
- R v Johnson* (2006) 791 APR 314
- R v Johnston* (1981) 24 CR (3d) 125
- R v Jolivet* (2000) 144 CCC (3d) 97
- R v Jones*, Central Criminal Court, 22 February 1828 (*The Times*, 23 February 1828)
- R v Jones* (*Sydney Herald*, 19 March 1842)
- R v K* (1991) 161 LSJS 135
- R v K* [2002] EWCA Crim 2878
- R v KNP* (2006) 67 NSWLR 227
- R v KU & Ors, ex parte A-G* [2008] QCA 20

- R v Kaines* [1833] NSWSupC 101 (*Sydney Herald*, 18 November 1833)
- R v Kamara* [2000] EWCA Crim 37
- R v Kanaan* [2006] NSWCCA 109
- R v Kane* (1977) 65 Cr App R 270
- R v Kassar* [2004] EWCA Crim 1812
- R v Karaibrahimovic* (2002) 164 CCC (3d) 431
- R v Karounos* (1995) 63 SASR 451
- R v Keane* [1994] 2 All ER 478
- R v Keelor*, *Colonial Times*, 29 October 1847
- R v Kellie* [1826] TASSupC 2 (*Colonial Times*, 31 March 1826)
- R v Kelly*, *The Age*, 7 August 1880)
- R v Kelly* (2004) 218 CLR 216
- R v Kelly & Connolly* [2003] EWCA 2957
- R v Kemp* [2008] QCA 355
- R v Kennedy* (2000) 118 A Crim R 34
- R v Kenney*, *The Courier*, 6 March 1847
- R v Kenny*, *Colonial Times*, 18 October 1854
- R v Khan* [2001] EWCA Crim 486
- R v Khazaal* [2006] NSWSC 1061
- R v Kilmeister (No 2)* [1838] NSWSupC 110 (*The Australian*, 1 December 1838 and *Sydney Gazette*, 1 December 1838)
- R v Kingston-upon-Hull Justices, ex parte McCann* (1991) 155 JP 569
- R v Kiszko* (1978) 68 Cr App R 62 (First Appeal) and *The Times*, 18 February 1992 (Second Appeal)
- R v Kizon* (1985) 18 A Crim R 59
- R v Kneebone* (1999) 47 NSWLR 450
- R v Knightsbridge Crown Court, ex parte Goonatilleke* [1985] 2 All ER 498
- R v Knowles*, Central Criminal Court, 11 January 1797, No T17970111-4

*R v Kormornick* [1986] VR 845

*R v L* [2001] QCA 535

*R v Labarre* (1978) 145 CCC (2d) 171

*R v Lacey & Ors* (1848) 3 Cox CC 517

*R v Lachance* (1980) 5 WBC 315

*R v Lambrecht & Ors*, Kingston Assizes, 2 April 1830 (*The Times*, 3 April 1830)

*R v Langford* [1990] Crim LR 653

*R v Langham* (*Colonial Times*, 26 July 1842)

*R v Langley* [2001] Crim LR 651

*R v Law*, *The Times*, 15 August 1996

*R v Lawless*, unreported, Full Court of the Supreme Court of Victoria, 10 May 1978, Transcript

*R v Lawless* (1979) 142 CLR 659 (High Court of Australia)

*R v Lawson* [1960] VR 37

*R v Lawson* (1990) 90 Cr App R 107

*R v Leathley*, *Mercury*, 25 January 1866

*R v Lemay* [1952] 1 SCR 232

*R v Leominster Magistrates Court* [1996] EWHC Admin 384

*R v Lewis* [1834] TASSupC 14 (*Colonial Times*, 13 May 1834 and *Hobart Town Courier*, 16 May 1834)

*R v Lewis-Hamilton* (1998) 1 VR 630

*R v Leyland Justices, ex parte Hawthorn* [1979] 1 All ER 202

*R v Libke* (2007) 81 ALJR 1309

*R v Liddle* (1928) 21 Cr App R 3

*R v Lilburn* (1637) 3 St Tr 1315

*R v Lilburn* (1649) 4 St Tr 1269

*R v Liristis* (2004) 146 A Crim R 547



- R v Litchfield* [1998] Crim LR 508
- R v Livermore* (2006) 67 NSWLR 659
- R v Liverpool Crown Court, ex parte Moss* [1996] EWHC Admin 223
- R v Liverpool Crown Court, ex parte Roberts* [1986] Crim LR 622
- R v Livingstone* [1993] Crim LR 597 (otherwise unreported); Court of Appeal, 8 March 1993, Transcript: Martin Walsh Cherer.
- R v Livingstone* (2004) 150 A Crim R 117
- R v Lobbon* [1995] 2 All ER 602
- R v Lodhi* [2006] NSWSC 586
- R v Logiacco* (1984) 11 CCC (3d) 374
- R v Lomage* (1991) 2 OR (3d) 621
- R v Lord* [1834] TASSupC 8 (*The Colonist*, 10 June 1834)
- R v Love* (1651) 5 St Tr 43
- R v Lovett* [2006] VSC 166
- R v Lowe* [1827] NSWSupC 32 (*Sydney Gazette*, 21 May 1827 and *The Australian*, 23 May 1827)
- R v Lucas* [1973] VR 693
- R v Lun*, unreported, Court of Criminal Appeal (NSW), 4 December 1992
- R v Lund* (*Sydney Morning Herald*, 8 November 1883, p 3)
- R v Lynch* [1841] NSWSupC 47 (*Australian*, 15 May 1841)
- R v Lyons* (1992-1993) 64 A Crim R 101
- R v Lyttle* (2004) 180 CCC (3d) 476
- R v M*, unreported, Court of Appeal, 5 November 1999, No 9803990/Y4, Transcript: Smith Bernal
- R v M* [1991] 2 Qd R 68
- R v M (KJ)* [2003] 2 Cr App R 322
- R v M (Wasted Costs Order)* [1996] 1 FLR 750

- R v MFA* (2002) 213 CLR 606
- R v MG* (2007) 69 NSWLR 20
- R v MRW* (1999) 113 A Crim R 308
- R v Macfie (No 2)* (2004) 11 VR 215
- R v Mackenzie (Moreton Bay Courier*, 26 November 1853)
- R v Macnamara*, Central Criminal Court, 20 April 1803, No T180304020-2
- R v MacMahon* (1933) 24 Cr App R 95
- R v Maguire* [1992] 1 QB 936
- R v Makin* [2004] EWCA Crim 1607
- R v Mallard* (2003) 28 WAR 1 (Court of Criminal Appeal (WA))
- R v Mallard* (2005) 224 CLR 125 (High Court of Australia)
- R v Mandryk* [1939] 3 DLR 543
- R v Manson, Sydney Herald*, 16 February 1841
- R v Marsh, The Times*, 6 July 1993
- R v Marshall* (2005) 200 CCC (3d) 179
- R v Martin*, York Crown Court, 31 March 1829 (*The Times*, 2 April 1829)
- R v Martin* [1998] 2 WLR 1
- R v Martin* [2000] VSCA 163
- R v Marylebone Magistrates Court, ex parte Gatting & Emburey* (1990) 154 JP 549
- R v Mason* [1975] 2 NZLR 289
- R v Mason & Ors* [1996] Crim LR 325 (otherwise unreported); Court of Appeal, 15 December 1995, Transcript: John Larking
- R v Masters* [1835] TASSupC 9 (*Colonial Times*, 12 May 1835)
- R v Mattan, The Times*, 5 March 1998 (otherwise unreported); Court of Appeal, 24 February 1998, No: 9706415/S2, Transcript: Smith Bernal Reporting Limited
- R v Maxwell*, unreported, Court of Appeal, 9 February 1995, Transcript: John Larking
- R v Maxwell*, unreported, Central Criminal Court, 16 May 1995
- R v Maxwell* (1996) 184 CLR 501

- R v May*, Central Criminal Court, 15 October 1740, No 174001015-20
- R v McCabe* [1825] TASSupC 17 (*Colonial Times*, 4 November 1825)
- R v McCann*, unreported, Court of Appeal, 28 November 2000, Transcript: Smith Bernal
- R v McCarthy*, *The Times*, 21 October 1993
- R v McClain* (1915) 7 WWR 1134
- R v McCreed* [2003] WASC 275
- R v McCullough* [1982] Tas R 43
- R v McDermott* [1841] NSWSupC 101 (*Australian*, 19 October 1841)
- R v McFayden & Taylor* (1967) 60 WWR 11
- R v McGowan*, Lancaster Assizes, 13 August 1831 (*The Times*, 16 August 1831)
- R v McIlfatrick* [2005] EWCA Crim 693
- R v McIlkenny* (1991) 93 Cr App R 287
- R v McIntyre* [1833] NSWSupC 86 (*Sydney Herald*, 15 August 1833)
- R v McIntyre* [1965] VR 593
- R v McKinney* (1991) 171 CLR 468
- R v McLauchlan* [1830] TASSupC 14 (*Hobart Town Courier*, 17 April 1830)
- R v McMaster* [1918] QSR 57
- R v MacNeil-Brown* [2010] VSCA 190
- R v McNeil* [2009] 1 SCR 66
- R v Mead & Belt*, York Assizes, 21 July 1823 (*The Times*, 24 July 1823)
- R v Meissner* (1996) 76 A Crim R 81
- R v Mercer*, *Colonial Times*, 7 June 1842)
- R v Mercer* (2005) 202 CCC (3d) 130
- R v Merrido & Nengavil* [1841] NSWSupC 48 (*Sydney Gazette*, 14 May 1841)
- R v Mills & Poole* [1997] 3 All ER 776 (House of Lords)
- R v Mills & Poole* [2003] 1 WLR 2931 (Court of Appeal (second appeal))
- R v Milton Keynes Magistrates' Court, ex parte Roberts* [1995] Crim LR 225

- R v Mita* [1996] 1 NZLR 95
- R v Mokbel (Ruling No 1)* [2005] VSC 410
- R v Mokbel (Ruling No 2)* [2005] VSC 502
- R v Momodou* [2005] 1 WLR 3442
- R v Monkey* [1835] NSWSupC 6 (*The Australian*, 13 & 17 February 1835)
- R v Moore* (1902) 5 GLR 193
- R v Mossman & Welsh* [1835] NSWSupC 1 (*Sydney Herald*, 5 February 1835)
- R v Moti* [2009] QSC 4
- R v Mulkerins & Sansom*, unreported, Court of Appeal, 20 June 1997, No 95/7501/Y4 & No 95/7424/Y4, Transcript
- R v Mullan (No 2)* [1980] NIJB 10
- R v Mullen* [1999] 2 Cr App R 143
- R v Mulvahill* (1992) 69 CCC (3d) 1
- R v Murphy* [2006] EWHC Admin 1735
- R v Murray & Mahoney* (1916) 33 DLR 702
- R v Mylonas and Ors* (1985) 20 A Crim R 214
- R v Neale*, *Sydney Herald*, 12 January 1842
- R v Nguyen* [2009] SASC 91
- R v Nicholas* (1846) 2 Cox CC 136
- R v Nicholson* (1936) 100 JPN 553
- R v Nicholson* [2010] SADC 80
- R v Nixon* (*Colonial Times*, 7 February 1857, p 2-3) and (*Hobart Town Mercury*, 6 February 1857, p 2-3; 9 February, 1857, p 3)
- R v Noble & Ors* (1713) 15 St Tr 731
- R v North*, unreported, New South Wales Court of Appeal, 4 December 1998, No 60264/98
- R v Norwood*, unreported, Supreme Court of Western Australia, No 413 of 1970
- R v Novac* (1976) 65 Cr App R 107

*R v Nugent* [1977] 3 All ER 662

*R v O* [2007] EWCA Crim 2220

*R v O'Brien* (1996) 66 SASR 396

*R v O'Connell* (1844) 7 Ir LR 260

*R v O'Connor* (1995) 103 CCC (3d) 1

*R v O'Connor* (1995) 130 DLR (4<sup>th</sup>) 235

*R v O'Farrell*, *The Age* (14, 16, 17, 23 March 1868; 1 & 6 April 1868) & *Illustrated Sydney News*, 20 April 1868

*R v Oldroyd* (1805) Russ & Ry 88

*R v Oliva* [1965] 3 All ER 116

*R v Oliver* (1995) 143 NSR (2d) 134

*R v Oliver* [2007] EWCA Crim 220

*R v Oliver*, Central Criminal Court, 26 October 1791, No T1791026-03

*R v Orchard & Orchard* (1838) 8 Car & P 559, n B and 568

*R v Osei-Bonsu* [2000] EWCA Crim 3535

*R v Overfield*, Shrewsbury Assizes, 19 March 1824 (*The Times*, 22 March 1824)

*R v Oxley* [1832] TASSupC 32 (*Tasmanian*, 7 December 1832)

*R v P* [2005] EWCA Crim 32

*R v P(L)* (2003) 172 CCC (3d) 195

*R v Pacey*, *The Times*, 3 March 1994 (otherwise unreported); Court of Appeal, 21 February 1994, No. 92/6419/X2, 21, Official Transcript

*R v Page* (1847) 2 Cox CC 221

*R v Palmer* [2000] VSCA 236

*R v Palmer*, Central Criminal Court (*The Times*, 8 November 1810)

*R v Paraskeva* (1983) 76 Cr App R 162

*R v Parsons & Stocker* (2004) 145 A Crim R 519

- R v Parrot* (*Colonial Times*, 7 September 1841)
- R v Passley* (2003) 176 Man R (2d) 53
- R v Patel & Ors* [2002] Crim LR 304 and [2001] EWCA Crim 2505
- R v Patmore*, 25 February 1789, Central Criminal Court, No T 17890225-1
- R v Patrick*, Central Criminal Court, 6 September 1732, No T 17320906-26
- R v Patterson* [2004] WASCA 63
- R v Peake & Others* (*Sydney Herald*, 18 April 1842)
- R v Pearce* [1824] TASSupC 11 (*Hobart Town Gazette*, 25 June and 8 August 1824)
- R v Pearson* [1953] QWN 18
- R v Pearson* (1957) 21 WWR (NS) 337
- R v Peck* [1840] TASSupC 3 (*Cornwall Chronicle*, 11 January 1840)
- R v Pederson* [2002] BCSC 1593
- R v Penney* (1998) 72 ALJR 1316
- R v Pernich & Maxwell* (1991) 55 A Crim R 464
- R v Perry (No1)* (1981) 27 SASR 172
- R v Petcherini* (1856) 7 Cox CC 79
- R v Peters*, *Mercury*, 1 & 2 December 1875
- R v Petty* (1991) 173 CLR 95
- R v Peverett* [2001] Crim LR 60
- R v Pizzardi* [1990] CarswellOnt 3184
- R v Pook*, *The Times*, 8 June 1871
- R v Power* (1994) 89 CCC (3d) 1
- R v Preston* [1993] 4 All ER 630
- R v Priddle*, Central Criminal Court, 18 April 1787, No T17870418-118
- R v Puddick* (1865) 4 F & F 497
- R v Proulx* [2003] CarswellOnt 827
- R v Pydar Justices* [1995] 160 JP 87

- R v R* (1997) 99 A Crim R 327
- R v RPS* (2000) 199 CLR 620
- R v Radbourne*, Central Criminal Court, 11 July 1787, No T17870711-1
- R v Raffaello*, *The Age*, 22 March 1855
- R v Raleigh* (1603) 2 St Tr 1
- R v Randall* [2002] 1 WLR 2237
- R v Randall & Farmer* [2004] TASSC 42
- R v Rasheed*, *The Times*, 20 May 1994
- R v Ratten* (1974) 131 CLR 510
- R v Rayner* [1998] VICSC 37
- R v Read & Ors*, *The Age*, 27 & 28 March 1855)
- R v Read & Lancaster*, *Cornwall Chronicle*, 15 April 1843
- R v Reading Justices, Ex p Berkshire County Council* [1996] 1 Cr App R 239
- R v Reardon* (2004) 146 A Crim R 475
- R v Reardon & Tydey* [1824] TASSupC 5 (*Hobart Town Gazette*, 11 June 1824)
- R v Reci* (1997) 70 SASR 78
- R v Redding*, *The Times*, 11 August 1823
- R v Reeves* (1994) 122 ACTR 1
- R v Regan* (2002) 161 CCC 3d 97
- R v Regan & Ors* [1838] TASSupC 12 (*Hobart Town Courier*, 15 June 1838)
- R v Reid & Ors*, *Colonial Times*, 2 April 1844
- R v Reilly* [1993] Crim LR 279
- R v Rich (Ruling No 9)* [2008] VSC 453
- R v Richardson* (1974) 131 CLR 116
- R v Richardson* (1994) 98 Cr App R 174
- R v Richardson & Ors*, *The Times*, 20 October 1989

- R v Riding*, Lancaster Assizes, 18 August 1823 (*The Times*, 23 August 1823)
- R v Ridley*, *The Times*, 21 March 1969
- R v Rigney* (2005) 241 LSJS 172
- R v Riscuta & Niga* [2003] NSWCCA 6
- R v Roach* [1841] TASSupC 30 (*Launceston Advertiser*, 8 July 1841)
- R v Roberts* (1984) 80 Cr App R 89
- R v Robertson & Nelson* (*Sydney Gazette*, 19 & 26 April 1842)
- R v Rooke* (1988) 40 CCC (3d) 484
- R v Ross* [1842] TASSupC 7 (*Colonial Times*, 15 March 1842 and *Launceston Courier*, 14 March 1842)
- R v Roulston* [1976] 2 NZLR 644
- R v Rowell*, *The Times*, 30 October 1810
- R v Rowlands (No 1)* [1836] TasSupC 1 (*Tasmanian*, 6 February 1836 and *True Colonist*, 5 February 1836)
- R v Rugari* (2001) 122 A Crim R 1
- R v Rumpf* [1988] VR 466
- R v Rusmanto* (1997) 6 NTLR 68
- R v Russell-Jones* [1995] 3 All ER 239
- R v Ryan & Ors* [1836] NSWSupC 25 (*Sydney Herald*, 9 May 1836)
- R v S* (1987) 38 CCC (3d) 109
- R v S* (1998) 133 CCC (3d) 559
- R v S* [2006] 2 Cr App R 23
- R v SG* [2007] CanLii 20675
- R v S (E)* (2000) 129 OAC 146
- R v S (PR)* (1987) 38 CCC (3d) 109
- R v Saleam* (1989) 16 NSWLR 14
- R v Salisbury* [2005] EWCA Crim 3107



- R v Samuel* [1834] TASSupC 3 (*Colonial Times*, 11 March 1834)
- R v Sanchez-Ruiz* (1991) 68 CCC (3d) 500
- R v Sandford* (1994) 72 A Crim R 160
- R v Sandy & Ors* [1839] NSWSupC 61 (*Sydney Herald*, 19 August 1839 and *The Australian*, 17 August 1839)
- R v Saunders* [1841] NSWSupC 14 (*Sydney Herald*, 16 February 1841)
- R v Saunders & Ors*, unreported, 29 August 1988, Central Criminal Court, No T881630, Transcript
- R v Saunders* (2004) 149 A Crim R 174
- R v Savion* (1980) 52 CCC (2d) 276
- R v Schlesinger* [1995] Crim LR 137
- R v Schreibvogel* (1884) 10 VLR 92
- R v Secretary of State for Home Office, ex parte Al-Mehdawi* [1990] 1 AC 876
- R v Sellick* [2005] 1 WLR 3257
- R v Seneviratne* [1936] 3 All ER 36
- R v Seymour* [1996] Crim LR 512
- R v Shaw* (1991) 57 A Crim R 425
- R v Shea & Ors* [1841] NSWSupC 7 (*Sydney Herald*, 25 February 1841 and *The Australian*, 25 February 1841).
- R v Sheen* (1827) 2 C & P 634
- R v Sheridan* (1811) 31 St Tr 544
- R v Sherwood*, *The Times*, 5 May 1879
- R v Shore*, Central Criminal Court, 14 January 1801, No T18010114-25
- R v Siemens* (1998) 122 CCC (3d) 552
- R v Silvester* [1841] NSWSupC 15 (*Sydney Herald*, 8 February 1841)
- R v Sim Lac*, *Sydney Morning Herald*, 6 April 1853
- R v Simmonds* (1823) 1 Car & P 84
- R v Simpson* [2001] EWCA Crim 468

*R v Sinclair* (1905) 25 NZLR 266

*R v Sing* [1936] 1 DLR 36

*R v Skingley & Burdett*, unreported, Court of Appeal, 17 December 1999, No 9903677 Z2/9904709/9903679, Transcript: Smith Bernal Report Ltd

*R v Skinner* [1994] 99 Cr App R 212

*R v Skubevski* [1977] WAR 129

*R v Sloan* (1988) 32 A Crim R 366

*R v Smart (No 4)* [2008] VSC 89

*R v Smith* (1872) 11 SCR (NSW) 69

*R v Smith* (1910) 6 Cr App R 19

*R v Smith* [2000] NSWCCA 202

*R v Smith* [2003] EWCA Crim 1240

*R v Smith* [2007] QCA 447

*R v Smith & Ors* [2004] EWCA Crim 2212

*R v Soma* (2003) 221 CLR 299

*R v Sonnet* [2010] VSCA 315

*R v Souleyman* (1996) 40 NSWLR 712

*R v Sparks & Campbell*, *Hobart Town Courier*, 4 August 1843; *Hobart Town Advertiser*, 28 July 1843 and *Colonial Times*, 1 August 1843

*R v Spillane* [1832] NSWSupC 32 (*Sydney Gazette*, 7 May 1832)

*R v Spizziri* [2001] 2 Qd R 686

*R v Spry and Dore* (1848) 3 Cox CC 221

*R v Squires & McCourt* [1837] NSWSupC 79 (*Sydney Herald*, 6 November 1837)

*R v Stanoevski v The Queen* (2001) 202 CLR 115

*R v Sterk* [1973] Crim LR 275

*R v Stiginani* (1867) 10 Cox CC 552

*R v Stinchcombe* (1991) 68 CCC (3d) 1

*R v Stipendiary Magistrate of Norfolk, ex parte Taylor* [1998] Crim LR 276

- R v Stirland* [1944] AC 315
- R v Stone* [2000] EWCA Crim 48
- R v Stratford Justices, ex parte Imbert* [1999] EWHC Admin 118
- R v Stratford Magistrates Court, ex parte Johnson* [2003] EWHC Admin 353
- R v Street, The Times*, 31 March 1997
- R v Stroner* (1845) 1 Car & K 650
- R v Su* [1997] 1 VR 1
- R v Subramaniam* (2004) 79 ALJR 116
- R v Sugarman* (1936) 25 Cr App R 109
- R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256
- R v Sutherland & Ors*, unreported, Nottingham Crown Court, 29 January 2002, No T20027203, Transcript: Cater Walsh & Co
- R v Szczerba* [2002] AJ No 915
- R v T (GJ)* (2000) 603 APR 71
- R v T (LA)* (1993) 84 CCC (3d) 90
- R v T (V)* [1992] 1 SCR 749
- R v Taillefer* (2004) 233 DLR (4<sup>th</sup>) 227
- R v Tait & Bartley* (1979) 24 ALR 473
- R v Taker, The Times*, 16 August 1824
- R v Talbot (No 2)* (1977) 38 CCC (2d) 560
- R v Tallboy* [1840] NSWSupC 44 (*Sydney Herald*, 12 August 1840)
- R v Taylor* [1829] NSWSupC 30 (*Australian*, 26 May 1829)
- R v Taylor* (1970) 75 WWR 45
- R v Taylor, The Times*, 11 December 1995 (otherwise unreported); Court of Appeal, 23 November 1995, No 95/0640/Y3, Transcript.
- R v Taylor & Taylor* (1994) 84 Cr App R 361
- R v Tandy*, unreported, Court of Appeal, 18 January 2000, No 199905037/Z3

*R v Teasdale* (2004) 145 A Crim R 345

*R v Tedder*, *The Times*, 31 October 1810

*R v Thacker & Ringrose*, unreported, 1847, Central Criminal Court (discussed in *R v Edwards, Underwood & Edwards* (1848) 3 Cox CC 82 at 83)

*R v Thomas (No 2)* [1974] 1 NZLR 658

*R v Thomas (No 4)* [2008] VSAC 107

*R v Thomas & Elizabeth Bates*, Central Criminal Court, 15 October 1740

*R v Thompson*, *Sydney Morning Herald*, 17 January 1844

*R v Thompson* (1876) 13 Cox CC 181

*R v Thompson* [1964] QWN 25

*R v Thompson & Ors* [1824] TASSupC 15 (*Hobart Town Gazette*, 25 June 1824)

*R v Thonemann* (1915) 9 QJP 31

*R v Thorngate*, Central Criminal Court, 21 April 1819, No T18190421-125

*R v Thursfield* (1838) 8 Car & P 269

*R v Thurtel*, *The Times*, 31 October & 5 December 1823

*R v Tibbs* [1824] TASSupC 1 (*Hobart Town Gazette*, 28 May 1824)

*R v Tilford* [1935] 4 DLR 691

*R v Tkachuk* (2001) 159 CCC (3d) 434

*R v Togher & Ors* [2000] EWCA Crim 111

*R v Tommy* [1827] NSWSupC 70 (*Monitor*, 26 November 1827)

*R v Tompkins*, unreported, Court of Appeal, 4 November 2005

*R v Tougher & Kelly* (*Sydney Gazette*, 7 November 1839 and *Sydney Herald*, 8 November 1839)

*R v Trimarchi* (1932) 32 SR (NSW) 451

*R v Tran* (2000) 118 A Crim R 218

*R v Travers* (1983) 34 SASR 112

*R v Treacy* [1944] 2 All ER 229

*R v Tregear* [1967] 1 All ER 989

- R v TS* [2004] NSWCCA 38
- R v TSR* (2002) 5 VR 627
- R v Tucker*, *The Times*, 10 November 1810
- R v Tuligi* [2009] SASC 306
- R v Tumney & Beattie*, *The Age*, 24 March 1855
- R v Tupper* (1992) 307 APR 348
- R v Turner* [1995] 3 All ER 432
- R v Twynings* (1909) 4 QJPR 1
- 
- R v Uddin & Ors*, unreported, Southwark Crown Court, 25 May 2005, No T2002-7012
- R v Ulman-Naruneic* [2003] SADC 52 (District Court)
- R v Ulman-Naruneic* [2003] SASC 43 (Court of Criminal Appeal (SA))
- R v Underwood* [2003] EWCA Crim 1500
- 
- R v V(J)* (1994) 67 CCC (3d) 280
- R v Vaillencourt*, *The Times*, 12 June 1992
- R v Valentine* [1842] TASSupC 4 (*Launceston Courier*, 16 January 1843)
- R v Vandercorn & Abbott*, 13 January 1796, Central Criminal Court, No T 17960113-27
- R v Vannick*, *The Age*, 23 March 1855
- R v Vasilou* [2000] Crim LR 845
- R v Vaughan*, *The Times*, 14 August 1828
- R v Vidall*, *Sydney Morning Herald*, 13 January 1845
- R v Vincent* (1839) 9 Car & P 91
- R v Vinette* (1974) 19 CCC (2d) 1
- R v Viro* (1978) 141 CLR 85
- R v Vella* [1990] 2 WAR 537
- R v Vocaturo*, unreported, Nottingham Crown Court, 8 October 2007

*R v Vollmer* [1996] 1 VR 95

*R v W (DD)* (1997) 114 CCC (3d) 506

*R v WK* [2002] WASC 176

*R v Wakefield & Wakefield, The Times*, 26 March 1827

*R v Walden* (1986) 41 SASR 421

*R v Ward* (1848) 2 Car & Kir 758

*R v Ward* [1993] 1 WLR 619

*R v Warren* [2005] EWCA Crim 659

*R v Warretya & Ors (Advertiser)*, 18 May 1861)

*R v We-War* [1842] NSWSupC 1 (*Inquirer*, 12 January 1842)

*R v Weaver* [2003] EWCA Crim 2214

*R v Webb* (1996) 186 LSJS 184

*R v Wellingborough Justices, ex parte Francois* (1994) 158 JP 813

*R v Wells* [1833] TASSupC 3 (*Tasmanian*, 22 March 1833)

*R v Weissensteiner* (1993) 178 CLR 217

*R v Wesley*, unreported, Supreme Court of Tasmania, 30 July 1990, No 27/1990, Transcript

*R v West* [2005] EWCA Crim 517

*R v Wheeler* [1967] 3 All ER 829

*R v Whelan, Colonial Times*, 10 December 1847

*R v Whelan, The Argus*, 19 & 25 February 1868

*R v White, The Australian*, 29 April 1826)

*R v White* [2006] WASCA 62

*R v White* [2007] NICC 29

*R v White & Ors* [1828] NSWSupC 79 (*The Australian*, 17 September 1828)

*R v Whitehorn* (1983) 152 CLR 657

- R v Whiteway*, Central Criminal Court, 24 October 1787, No 17871024-19
- R v Whitton*, *Sydney Herald*, 26 February 1840)
- R v Wiggins* (1867) 10 Cox CC 562
- R v Williams* (1836) 7 C & P 320
- R v Williams* (*Hobart Town Courier*, 30 June 1843)
- R v Williams* [1970] 2 NSWLR 41
- R v Williams* [2005] CarswellOnt 6791
- R v Williams & Harper* (*Colonial Times*, 6 June 1848)
- R v Wilmot* (1988) 89 Cr App R 341
- R v Wilson* [1997] 2 NZLR 500
- R v Wilson* [1998] 2 Qd R 599
- R v Wilson*, Central Criminal Court, 30 November 1796, No T17961130-42
- R v Wilson & Grimwade* (1994) 73 A Crim R 190 and [1995] 1 VR 163
- R v Wilson & Ors*, *Hobart Town Advertiser*, 28 April 1843
- R v Winning* [2003] WASCA 245
- R v Winston Brown* [1994] 1 WLR 1599 (Court of Appeal)
- R v Winston-Brown* [1998] AC 367 (House of Lords)
- R v Witnaldar* (*Mercury*, 30 January 1863)
- R v Witts & Witts* [1991] Crim LR 562
- R v Wood & Brown*, Central Criminal Court, 8 December 1784, No T 17841208-2
- R v Woodhead* (1847) 2 Car & Kir 520
- R v Woolridge*, Central Criminal Court, 25 February 1784, No T17840225-96
- R v Woolwich Magistrates Court, ex parte DPP* [2001] EWHC Admin 898
- R v Wright* [1829] NSWSupC 70 (*The Australian*, 9 October 1829 and *Sydney Gazette*, 13 October 1829)
- R v Wright* (1934) 25 Cr App R 35
- R v Wright* [2000] Crim LR 510

*R v Wu* (1934) 62 CCC 90

*R v Xinaris* (1958) 43 Cr App R 30

*R v Yebes* [1987] 2 SCR 168 and (1987) 43 DLR (4<sup>th</sup>) 424

*R v Yilmaz & Ors* (2007) EWCA Crim 308

*R v Yirtici*, unreported, Court of Appeal, 12 July 1996 No 95/4882/Y2, Transcript Smith Bernal

*R v Zehr* (1981) 54 CCC (2d) 65

*Ragg v Magistrates Court of Victoria & Corcoris* (2008) 179 A Crim R 568

*Ramdahnie v State* [2006] 1 WLR 796

*Re: A Solicitor (Wasted Costs Order No 1 of 1994)* [1996] 1 FLR 40

*Re: Adams* unreported, Queens Bench Division of Northern Ireland, 7 June 2000, Transcript

*Re: Adams* unreported, Court of Appeal of Northern Ireland, 12 December 2001, Transcript (on appeal)

*Re: Bledsoe and Law Society of British Columbia* (1985) 11 DLR (4<sup>th</sup>) 280

*Re: Morin* (1995) 37 CR 9(4<sup>th</sup>) 395

*Re: Van Beelen* (1974) 9 SASR 163

*Re Barlow Clowes Gilt Managers Ltd* [1991] 4 All ER 385

*Re: J* [1990] FCR 193

*Rees v Sinclair* [1974] 1 NZLR 180

*Reference Re: Nepoose* (1992) 71 CCC (3d) 419

*Rondel v Worsley* [1967] 1 QB 443 (Court of Appeal)

*Rondel v Worsley* [1969] 1 AC 191 (House of Lords)

*Rowe & Davis v United Kingdom* (2000) 30 EHRR 1



*Sankey v Whitlam* (1978) 142 CLR 1

*Secretary of State for Home Department v AF* [2009] UKHL 28

*Secretary of the State for Home Department v MB & Or* [2008] 1 AC 440

*Sobh v Commissioner of Police* (1993) 65 A Crim R 466

*State v Beal* (1930) 154 SE 604 (see also the “The Castonia Strikers Case” (1931) 44 Harv L Rev 1118-1123)

*State v Bujnowski* (1987) 130 NH 1

*State v Grant* [2007] 1 AC 1

*State v O’Donoghue* [1976] IR 325

*State v Smith* (1814) 1 NH 346

*Summers v Cosgriff* [1979] VR 564

*Sumner & Livesley v John Brown & Co.* (1909) 25 TLR 745

*Swash v DPP* [2009] All ER (D) 39

*Thacker v Crown Prosecution Service, The Times*, 29 December 1997

*Tobler v State* (1984) 699 P (2d) 350

*Town of Newton v Rumery* (1987) 480 US 386

*Tran v Magistrates’ Court of Victoria* [1998] 4 VR 294

*Trimble v Hill* (1879) 5 AC 342

*Trompert v Police* [1985] 1 NZLR 357

*Tucker v CPS* [2008] EWCA Crim 3063

*United States v Bagley* (1985) 473 US 667

*United States v Blueford* (2002) 312 F 3d 962

*United States v Bushell* (1990) 729 F Supp 632

*United States v Caccia* (1997) 122 F 3d 136

*United States v Garsson* (1923) 291 Fed 646

*United States v McFarland* (1945) 150 F 2d 593

*United States v Roberts* (1989) 726 F Supp 1359

*United States v Wade* (1967) 388 US 218

*Vanscoy v Ontario* [1999] OJ No 1661

*Walton v Gardiner* (1993) 177 CLR 378

*Ward v Special Criminal Court* [1999] 1 IR 60

*Webb v Catchlove* (1886) 3 TLR 169

*Wellcome Foundation Ltd v VR Laboratories (Aust) Pty Ltd* (1980) 42 FLR 266

*Western Australia v Carney* [2010] WASCA 90

*Western Australia v Christie* (2005) 30 WAR 514

*Western Australia v Cooley* [2005] WASCA 160

*Western Australia v D* (2007) 179 A Crim R 377

*Western Australia v JWRL* [2010] WASCA 179

*Western Australia v Narkle* [2006] WASCA 113

*Whitehouse v Jordan* [1981] 1 WLR 246

*Wilkinson v Crown Prosecution Service* (1998) 162 JP 591

*Woolmington v DPP* [1935] AC 462

*Z v Finland* (1997) 25 EHRR 371

*Ziems v the Prothonotary of Supreme Court of New South Wales* (1957) 97 CLR 279

## LEGISLATION

### AUSTRALIA

*Crimes Act 1900 (ACT)*

*Crimes (Criminal Trials) Act 1993 (VIC)*

*Crimes (Criminal Trials) Act 1999 (VIC)*

*Criminal Code 1899 (QLD)*

*Criminal Code 1924 (TAS)*

*Criminal Code 1913 (WA)*

*Criminal Code (NT)*

*Criminal Law Consolidation Act 1935 (SA)*

*Criminal Procedure Act 1986 (NSW)*

*Criminal Procedure Act 2009 (VIC)*

*Criminal Procedure Act 2004 (WA)*

*Crown Advocate Act 1973 (Tas)*

*Crown Prosecutors Act 1986 (NSW)*

*Director of Public Prosecutions Act 1990 (ACT)*

*Director of Public Prosecutions Act 1983 (Cth)*

*Director of Public Prosecutions Act 1986 (NSW)*

*Director of Public Prosecutions Act (NT)*

*Director of Public Prosecutions Act 1984 (Qld)*

*Director of Public Prosecutions Act 1991 (SA)*

*Director of Public Prosecutions Act 1986 (Tas)*

*Director of Public Prosecutions Act 1991 (WA)*

*Evidence (Miscellaneous Provisions) Act 1991 (ACT)*

*Evidence Act 1995 (NSW)*

*Evidence Act 1929 (SA)*

*Evidence Act 2000 (TAS)*

*Evidence Act 1906 (WA)*  
*Evidence Act 1939 (NT)*  
*New South Wales Barristers' Rules*  
*Public Prosecution Act 1994 (Vic)*  
*Solicitors' Rules of New South Wales*  
*Summary Procedure Act 1921 (SA)*  
*Supreme Court Rules 1970 (NSW)*  
*Treason-Felony Act 1868 (NSW)*  
*Uniform Evidence Act 1995 (Cth)*  
*Uniform Civil Procedure Rules 1999 (QLD)*

## OVERSEAS JURISDICTIONS

*Australian Courts Act 1828 (Imp)*  
*Bill of Rights Act 1990 (NZ)*  
*Civil Procedure Rules 1999 (England)*  
*Crime and Disorder Act 1997 (England)*  
*Criminal Appeal Act 1907 (England)*  
*Criminal Evidence Act 1898 (England)*  
*Criminal Justice Act 1967 (England)*  
*Criminal Justice Act 2003 (England)*  
*Criminal Justice and Public Order Act 1994 (England)*  
*Criminal Procedure Act 1865 ("Denman's Act")*  
*Criminal Procedure and Investigations Act 1996 (England)*  
*Criminal Procedure Rules 2005 (England)*  
*Criminal Procedure Rules 2010 (England)*  
*Evidence Act 1843 (Jamaica)*  
*Indictable Offences Act 1848 (England)*  
*Magistrates' Courts (Advance Information) Rules 1985*

*Poor Persons Defence Act 1903 (England)*

*Prisoners Counsel Act 1836 (England)*

*Prosecution of Offences Act 1985 (England)*

*Treason Act 1695 (England)*

*Treason Act 1702 (England)*

## TREATIES

*European Convention of Human Rights*

## OTHER SOURCES

### CONFERENCE PAPERS | SEMINAR PAPERS

Blakemore M, “Equality of Arms in an Adversary System,” Conference Paper presented at the International Association of Prosecutors Annual Conference, Cape Town, 4 September 2000, available at:

<http://www.odpp.gov.au/speeches/Final%20paper%20Capetown.htm>

Cowdrey N, QC, “Human Rights and the Prosecutor-Setting the Scene,” Keynote Address delivered at the International Association of Prosecutors Annual Conference, Cape Town, 4 September 2000, available at:

[http://www.odpp.nsw.gov.au/speeches/IAP202000%20-%20Human%20Rights%20and%20the%20Prosecutor\\_.htm](http://www.odpp.nsw.gov.au/speeches/IAP202000%20-%20Human%20Rights%20and%20the%20Prosecutor_.htm)

Cowdrey N, QC, “The Prosecutor’s Duty of Disclosure,” Speech delivered to the Public Defenders’ Conference, Sydney, 8 May 2004, available at:

<http://www.odpp.nsw.gov.au/speeches/Public%20Defenders%202004%20-%20Disclosure.htm>

Corns C, “Police Summary Prosecutions: the Past, Present and Future”, Paper presented at the History of Crime, Policies and Punishment Conference, Australian Institute of Criminology, 9-10 December 1999, available at:

<http://www.aic.gov.au/events/aic%20upcoming%20events/1999/media/conferences/hcpp/corns/ashx>

Gray I, “Sentencing in Magistrates’ and Local Courts in Australia”, Paper presented at the Sentencing Conference, National Judicial College of Australia, Canberra, February 2008, available at:

<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2008/Sentencing%20Conference%202008/papers/gray.pdf>

Kiernan P, “Lessons from the Past: Practical Lessons from the UK cases,” 126<sup>th</sup> International Senior Seminar, Visiting Experts’ Papers, 109, available at:

[http://www.unafei.or.jp/english/pdf/PDF\\_rms/no66/F\\_p109-p117.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no66/F_p109-p117.pdf)

Krone T, "Heading Upstream: Prosecution Intervention in the Investigative Process," Paper presented at the Criminal Investigations Workshop, ARC Centre of Excellence in Policing and Security, Australian National University, Canberra, 10-11 December 2009, available at:

[http://ceps.anu.edu.au/events/criminal\\_investigations\\_workshops/papers/Tony%20Krone%20-%20Heading%20upstream.pdf](http://ceps.anu.edu.au/events/criminal_investigations_workshops/papers/Tony%20Krone%20-%20Heading%20upstream.pdf)

Krone T, "Police and Prosecution," Paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, Australian Institute of Criminology, Canberra, 22-23 March 1999, available at:

[http://www.aic.gov.au/events/aic%20upcoming%20events/1999/~/\\_media/conferences/outlook99/krone.ashx](http://www.aic.gov.au/events/aic%20upcoming%20events/1999/~/_media/conferences/outlook99/krone.ashx)

McGoey C, "The 'Good' Criminal Law Barrister: A Crown Perspective," Second Colloquium on the Legal Profession, Toronto, 8 March 2004, available at:

[http://www.lsuc.on.ca/media/christine\\_mcgoye\\_good\\_criminal\\_lawyer\\_mar0504.pdf](http://www.lsuc.on.ca/media/christine_mcgoye_good_criminal_lawyer_mar0504.pdf)

Rolfe P, QC, "Disclosure by Both Sides," Paper presented at the Australian Institute of Criminology Conference, Melbourne, 11 April 1996, available at:

[http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~/\\_media/conferences/prosecuting/rofe.ashx](http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~/_media/conferences/prosecuting/rofe.ashx)

Rozenes M, QC, "The Role of the DPP in the Investigation and Prosecution of Complex Fraud," speech delivered at the ASC Law Enforcement Conference, Perth, 16 September 1994, available at: <http://www.cdpp.gov.au/Director/Speeches/19940916mr.aspx>

Rozenes M, QC, "Prosecutorial Discretion in Australia Today," Speech delivered at the Australian Institute of Criminology Conference, Melbourne, 18-19 April 1996, available at:

[http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~/\\_media/conferences/prosecuting/rozenes.ashx](http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~/_media/conferences/prosecuting/rozenes.ashx)

Taylor C, "Advance Disclosure and the Culture of the Investigator; The Good Idea That Never Quite Caught On?," Paper presented at the 19th Conference of the Australian and New Zealand Society of Criminology Conference, Hobart, 7-9 February 2006, available at:

[http://www.brad.ac.uk/acad/management/external/pdf/workingpapers/2006/Booklet\\_06-21.pdf](http://www.brad.ac.uk/acad/management/external/pdf/workingpapers/2006/Booklet_06-21.pdf)

Warren M, Chief Justice, "The Duty owed to the Court – Sometimes Forgotten," Keynote Address to the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009, available at: <http://www.jca.asn.au/attachments/2009OriginalKeynoteAddress.pdf>

## INTERNET MATERIALS

The Australian Dictionary of Biography (Online Edition), available at:

<http://www.adb.online.anu.edu.au/adbonline.htm>

Collection of pamphlet accounts of the criminal trials held at the Central Criminal Court between 1670 and 1913, available at: <http://www.oldbaileyonline.org/>

Court proceedings for the period between 1824 and 1843, compiled and published by the School of History and Classics, University of Tasmania and Division of Law, Macquarie University, available at: <http://www.austlii.edu.au>

Craigie C, SC, "Unrepresented Defendants: The Criminal Justice Perspective," 2005, available at:

[http://www.lawlink.nsw.gov.au/lawlink/pdo/ll\\_pdo.nsf/pages/PDO\\_unrepresentedlitigants](http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_unrepresentedlitigants)

Crown Prosecution Service website, available at: [www.cps.gov.uk/](http://www.cps.gov.uk/)

Crown Prosecution Service, "CPS Instructions for Prosecuting Advocates," available at: [http://www.cps.gov.uk/legal/p\\_to\\_r/prosecuting\\_advocates\\_instructions/](http://www.cps.gov.uk/legal/p_to_r/prosecuting_advocates_instructions/)

Crown Prosecution Service, "The Selection of Prosecution Witnesses," accessed on 16 January 2006, available at: [http://www.cps.uk/legal/section16/chapter\\_b.html](http://www.cps.uk/legal/section16/chapter_b.html)

Director of Public Prosecutions (ACT) website, available at: [www.dpp.act.gov.au/](http://www.dpp.act.gov.au/)

Director of Public Prosecutions (Cth) website, available at: [www.cdpp.gov.au/](http://www.cdpp.gov.au/)

Director of Public Prosecutions (NT) website, available at: [www.nt.gov.au/justice/dpp/](http://www.nt.gov.au/justice/dpp/)

Director of Public Prosecutions (NSW) website, available at: [www.odpp.nsw.gov.au/](http://www.odpp.nsw.gov.au/)

Director of Public Prosecutions (Qld) website, available at: [www.justice.qld.gov.au/justice-services/office-of-the-director-of-public-prosecutions](http://www.justice.qld.gov.au/justice-services/office-of-the-director-of-public-prosecutions)

Director of Public Prosecutions (SA) website, available at: [www.dpp.sa.gov.au](http://www.dpp.sa.gov.au)

Director of Public Prosecutions (Tas) website, available at: [www.crownlaw.tas.gov.au/dpp](http://www.crownlaw.tas.gov.au/dpp)

Director of Public Prosecutions (Vic) website, available at: [www.odpp.vic.gov.au/](http://www.odpp.vic.gov.au/)

Director of Public Prosecutions (WA) website, available at: [www.dpp.wa.gov.au/](http://www.dpp.wa.gov.au/)

Irwin M, Judge, "Criminal Code Amendments: Rediscovering Criminal Discovery and the Challenges of Disclosure – A Judicial Perspective," available at: [archive.sclqld.org.au/judgepub/2005/irwin220805.pdf](http://archive.sclqld.org.au/judgepub/2005/irwin220805.pdf)

Liebman J, *et al*, "A Broken System Part II: Why There is So Much Error in Capital Cases and What can be Done About It," 11 February 2002, available at: <http://www2.law.columbia.edu/brokensystem2/index2.html>

Newspaper archives on the National Library of Australia, available at: <http://newspapers.nla.gov.au/ndp/del/home>

Public Record Office of Victoria, "Eureka on Trial," available at: <http://eureka.imagineering.com.au/home.htm>

Sutherland J, "Role of the Prosecutor: A Brief History," Criminal Lawyers Association Newsletter, June 1998, Vol 19, no 2, p 17, accessed o 18 September 2009, available at: [www.criminallawyers.ca.newslett/19-2/sutherland.htm](http://www.criminallawyers.ca.newslett/19-2/sutherland.htm)

Taylor C, "Disclosure Strategies and Dilemmas within Routine Criminal Case Construction by UK Detectives" (2007), available at: <http://ssrn.com.abstract=995864>.

Transcript of counsels' addresses in *R v Riel* in 1885 in Canada, available at: <http://www.law.umkc.edu/faculty/projects/ftrials/riel/crownaddress.html>

Wilde R, QC, Northern Territory DPP, "External Briefing Policy," available at: [http://www.nt.gov.au/justice/dpp/html/external\\_briefing.html](http://www.nt.gov.au/justice/dpp/html/external_briefing.html)

## MISCELLANEOUS

British Broadcasting Corporation (BBC) News, "'Murderer' freed after 20 years," 30 March 2000.

## NEWSPAPERS | MAGAZINES

"Murder by Natives," *Perth Gazette and WA Journal* (Perth), 25 May 1839

"Report to *The State Trials*," *The Age* (Melbourne), 28 February 1855

"So How Does the Crown Prosecution Service reach all those odd decisions," *Evening Standard* (United Kingdom), 8 November 2004

"The Black Natives," *Hobart Town Advertiser* (Hobart), 18 November 1826

"Trial of WH Barber," *The Courier* (Tasmania), 12 June 1847

Untitled, *Tasmanian and Austral-Asiatic Review* (Tasmania), 23 April 1830

Abrams F, "Forbidden Evidence," *The Guardian* (United Kingdom), 2 December 2003

Ackland R, "When the Law Provides no Justice, Call a Reporter," *Sydney Morning Herald* (Sydney), 10 October 2008

Bates S, Dyer C, and Watts N, "MPs Criticise Queen over Burrell Case," *The Guardian* (United Kingdom), 4 November 2002

Beard A, "DA Will be Disbarred," *Chicago Sun Times* (Chicago), 17 June 2007

Bennathan J, "Made for Miscarriages," *The Times* (United Kingdom), 25 July 2000

Bentham M, "Criminals allowed to walk free: Report blasts London CPS for Incompetence," *London Evening Standard* (United Kingdom), 16 March 2010

Carslie A, "A Case of True Confidence and Extreme Loyalty," *The Telegraph* (United Kingdom), 3 November 2002



- Devine M, "Off with the Cuffs of Limitation," *Sydney Morning Herald* (Sydney), 2 November 2006
- Dyer C, "Making a Pact with the Devil," *The Guardian* (United Kingdom), 30 October 2000
- Editorial, "The Bush-Ranger: Dreadful Outrages and Murder!," *Colonial Times* (Hobart), 10 March 1826
- Editorial, *Colonial Times* (Hobart), 14 April 1826
- Editorial, *The Times* (United Kingdom), 4 November 1834
- Editorial, "Shocking Attempt at Murder," *Colonial Times* (Hobart), 6 February 1844
- Editorial, *The Age* (Melbourne), 24 February 1855
- Editorial, *The Age* (Melbourne), 27 February 1855
- Editorial, "The Counsel of Ahitophel," *The Age* (Melbourne), 28 February 1855
- Editorial, "The State Trials," *The Argus* (Melbourne), 28 February 1855
- Editorials, "Why the Trials are Postponed" and "'Tampering with the Jury'," *The Age* (Melbourne), 2 March 1855
- Editorial, *The Age* (Melbourne) 26 February 1880 and *South Australian Register* (Adelaide) reproduced in *The Age* (Melbourne), 16 March 1855
- Editorial, "The Saddle on the Right Horse," *The Age* (Melbourne), 24 March 1855
- Editorial, "Nixon's Trial," *Hobart Town Mercury* (Hobart), 9 February 1857
- Editorial, "Accounting for Huntley," *The Guardian* (United Kingdom), 18 December 2003
- Eisenhammer J, "Lyell Misled Commons over Levitt deal," *The Independent* (United Kingdom), 30 May 1995
- Eisenhammer J and Willcox J, "How the Levitt Deal was Hammered Out," *The Independent* (United Kingdom), 30 May 1995
- Eisenhammer J, "Lyell Faces New Levitt Case Row," *The Independent* (United Kingdom), 5 June 1995
- Egan C, "A Murderer No More," *The Australian* (Australia), 22 February 2006
- Egan C, "I Just Want a Normal Life," *Sunday Times* (Perth), 14 October 2006
- Emmerson B, "Prosecution in the Dock," *The Observer* (United Kingdom), 14 November 1999
- Fife-Yeomans J, "Rape Victims Last Straw," *Daily Telegraph* (United Kingdom), 22 May 2007

- Flint D, "Keep the Peace: Learn from Giuliani's Tactics," *The Australian* (Australia), 26 November 2008
- Gibb F, "Are Crown Prosecution Service Advocates Any Good?", *The Sunday Times* (United Kingdom), 22 July 2009
- Gibbs S, "Prosecutor Called to Account for Attack on Defenders," *Sydney Morning Herald* (Sydney), 26 September 2005
- Guest D, "WA's Police Prosecutors could lose Role", *The Australian*, 24 October 2008 (Australia)
- Horsnell M, "Wrong Man Jailed for 1975 Killing," *The Times* (United Kingdom), 18 February 1992
- Hughes G, "Lies, Bombs and Jihad," *The Australian* (Australia), 16 September 2008
- Jenkins R, "Conviction too Late for Victim of 'Worst Miscarriage of Justice of all Time," *The Times* (United Kingdom), 13 November 2007
- Jones L, "DPP Defends Prison Van Decision," *Sydney Morning Herald* (Sydney), 28 June 2010
- Kappelle L, "Prosecutor 'fell short' in Mallard Case," *Sydney Morning Herald* (Sydney), 15 November 2007
- Laurie V and Taylor P, "Cost of Innocence," *The Australian*, 20 September 2006, *Hobart Town Courier* (Hobart), 4 August 1843
- MacDonald K, Sir, "Our System of Justice Must Enjoy Public Confidence," *The Independent*, (United Kingdom), 1 February 2005
- Mancuso R, "Gang-rape Prosecutor stood aside," *The Australian* (Australia), 11 December 2007
- Marriner C, "Prosecutor in Child Rape Case Stood Aside," *Sydney Morning Herald* (Sydney), 12 December 2007
- Mills H, "Prosecution Service Comes under Siege," *The Independent* (United Kingdom), 31 May 1995
- McSmith A, "Miscarriage of Justice corrected as Jury finds Man Guilty of Murder, *The Independent* (United Kingdom), 13 November 2007
- McVeigh T, "Low-Paid Suffer from Legal Aid Cuts," *The Observer* (United Kingdom), 1 February 2009
- Moore I, "Court Frets about the Rapist, not his Victim," *The Australian* (Australia), 23 April 2007
- Murray P, "Chief Justice attacks DPP's Hidden Evidence", *The West Australian* (Australia), 21 September 2010

Osborne A, "Collapsed BA Price-Fixing trial places OFT and Virgin in the dock," *The Telegraph* (United Kingdom), 10 May 2010

Perpitch N, "276K for Mallard Prosecutor," *The Australian* (Australia), 28 July 2009

Pilkington E, "Empty- Handed Justice," *The Guardian*, Section 2 (United Kingdom), May 30 1995

Possley M and Armstrong K, "The Flip Side of a Fair Trial," *Chicago Tribune* (United States of America), 11 January 1999

Rozenberg J and Davies C, "Yet another Labour Snub to the Queen," *The Daily Telegraph* (United Kingdom), 3 March 2004

Skelton R and Shiel F, "The Myth of the Clean Police Force," *The Age* (Melbourne), 12 June 2004

Starmer K, "Outdated Crown Prosecution Service should be Modernised, says DPP," *The Guardian* (United Kingdom), 30 November 2009

Steele J, "Blunkett may be jumping the gun over CPS name," *The Daily Telegraph* (United Kingdom), 3 March 2004

Stewart D, "Cash under the Bench," *The Australian* (Australia), 26 February 2007

Summerskill B, "How Feuding and Snobbery Trapped an Innocent Man," *The Observer* (United Kingdom), 3 November 2002

Wilson D, "Prosecutor in Duke Case is Disbarred for Ethics Breaches," *New York Times* (United States of America), 16 June 2007

## **PROFESSIONAL RULES, GUIDELINES, POLICIES AND PROTOCOLS**

### **AUSTRALIA**

*Australian Bar Association Model Rules*, available at:

<http://www.austbar.asn.au/images/stories/PDFs/CurrentABAModelRules2002.pdf>

*Director's Guidelines 2010 (Qld)*, available at:

[http://www.justice.qld.gov.au/data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/data/assets/pdf_file/0015/16701/Directors-guidelines.pdf)

*Guidelines for Prosecutors (ACT)*, available at:

<http://www.dpp.act.gov.au/Guidelines%20for%20Prosecutors.html>

*New South Wales Barristers' Rules*

*Professional Conduct Rules of the Law Society of Western Australia*

*Prosecution Disclosure Policy (Cth)*, available at:

<http://www.cdpp.gov.au/Publications/DisclosurePolicy/>

*Prosecution Guidelines 2005 (NT)*, available at:

<http://www.nt.gov.au/justice/dpp/html/guidelines.html>

*Prosecution Guidelines (Tas)*, available at:

[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)

*Prosecution Policy and Guidelines 2010 (Vic)*, available at:

<http://opp.vic.gov.au/wps/wcm/connect/justlib/office+of+public+prosecutions/home/opp+-+prosecution+policies>

*Prosecution Policy of the Commonwealth*, available at:

<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>

*Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, available at: <http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf>

*South Australian Barristers' Rules*, available at: <http://www.sabar.org.au/pub.php>

*Solicitors Rules of New South Wales 1995*

*Statement of Prosecution Policy and Guidelines (SA)*, available at:

[http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)

*Statement of Prosecution Policy and Guidelines 2005 (WA)*, available at:

[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)

*Victorian Bar Inc Practice Rules; Rules of Conduct and Compulsory Continuing Legal Education Rules*

## OVERSEAS JURISDICTIONS

*Attorney General's Guidelines: Disclosure of Information in Criminal Proceedings* (2000) (England)

*Attorney General's Guidelines: Disclosure of Information in Criminal Proceedings* (2005) (England)

*Attorney-General Guidelines on the Acceptability of Pleas* 2000 (England)

*Attorney-General Guidelines on the Acceptability of Pleas* 2009 (England)

*Code of Conduct of the Bar of England and Wales* (8<sup>th</sup> ed), available at: [http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section1codeofconduct/partiii\\_fundamentalprinciples/](http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section1codeofconduct/partiii_fundamentalprinciples/)

*Code of Professional Conduct* of the Canadian Bar Association, available at:

<http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf>

*Control and Management of Heavy Fraud and Other Complex Criminal Cases Protocol* (England)

*Code for Crown Prosecutors* (Crown Prosecution Service, England)

Crown Prosecution Service, *CPS/Bar Framework for Prosecution Advocates in the Crown Court* (London, Crown Prosecution Service, 2006)

Department of Justice, Hong Kong SAR, *The Statement of Prosecution Policy and Practice-Code for Prosecutors* (Hong Kong, Hong Kong SAR Dept of Justice, 2004), available at: <http://www.doj.gov.hk.hk/eng/public/pubsoppapcon.htm>

*Model Rules of Professional Conduct* of the American Bar Association, available at: [http://www.abanet.org/cpr/mrpc/rule\\_1\\_3.html](http://www.abanet.org/cpr/mrpc/rule_1_3.html)

*Protocol for the Control and Management of Unused Material at the Crown Court* (England)

*Solicitors Code of Conduct* (England), available at: <http://www.lawsociety.org.uk/professional/conduct/guideonline/view=page.law?POLICYID=480>

*Written Standards for the Conduct of Professional Work* (England) for barristers, available at: <http://www.barstandardsboard.org.uk/assets/documents/Written%20Standards%20for%20the%20Conduct%20of%20Professional%20Work.pdf>

#### **SPEECHES | LECTURES | ADDRESSES**

Angiolini A, "Public Prosecutor: Hero or Villain," Speech delivered 25 January 2005, "The Edinburgh Lectures," available at: [http://download.edinburgh.gov.uk/lectures/4\\_SG39s\\_speech.doc](http://download.edinburgh.gov.uk/lectures/4_SG39s_speech.doc)

Bugg D, QC, "The Role of the DPP in the 20th Century," Speech given at the Judicial Conference of Australia, Melbourne, 13 November 1999, available at: <http://www.cdpp.gov.au/Director/Speeches/19991113db.aspx>

Bugg D, QC, "Prosecuting Fraud," Speech delivered at the Australian Institute of Criminology Fraud Prevention and Control Conference, Surfers Paradise, 25 August 2000, available at: <http://www.cdpp.gov.au/Director/Speeches/20000825db.aspx>

Bugg D, QC, "Accountability, Independence and Ethics in the Prosecution Practice," Speech delivered at the 18<sup>th</sup> Annual Conference of the International Society for the Reform of the Criminal Law, Montreal, 8 August 2004, available at: <http://www.cdpp.gov.au/Director/Speeches/20040808db.aspx>

Bugg D, QC, "The Independence of the Prosecutor and the Rule of Law," Speech at the "Rule of Law: the Challenge of a Changing World" conference, Brisbane, 31 August 2007, available at: <http://www.cdpp.gov.au/Director/Speeches/20070831db.aspx>

Cunneen M, "Living with the Law," the Sir Ninian Stephen Lecture delivered at the University of Newcastle School of Law, 24 September 2005, available at: <http://www.smh.com.au/news/national/margaret-cunneens-lecture/2005/09/23/1126982234942.html>

Goldsmith P, Lord, "Attorney-General's Speech to Whitehall Prosecutors Conference 2005," London, 4 October 2005, available at:

[http://www.attorneygeneral.gov.uk/attachments/04\\_10\\_05\\_speech\\_WPC\\_delivered.doc](http://www.attorneygeneral.gov.uk/attachments/04_10_05_speech_WPC_delivered.doc)

Kirby M, Justice, "The Crisis in the Law," Speech delivered at the Law Society of New South Wales Annual Dinner, Sydney, 31 October 1996, available at:  
[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_probono.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_probono.htm)

Leveson B, Lord Justice, "Criminal Justice in the 21<sup>st</sup> Century", the Roscoe Lecture, St George's Hall, Liverpool, 29 November 2010, available at:  
<http://www.judiciary.gov.uk/NR/rdonlyres/BD53EA6F-EEF3-47F6-A425-3BE8F912BCF5/0/speechbylevesonlroscoelecture>

Martin B, QC, "Prosecution Issues," Speech delivered at the AIJA Conference: Perspectives on White Collar Crime: Towards 2000, Melbourne, 27 October 1998, available at:  
<http://www.cdpp.gov.au/Director/Speeches/19980227bm.aspx>

Phillips J, "Was Justice Really Done," Speech delivered at the University of Ballarat Democracy Conference, Ballarat, 25-27 November 2004, available online at  
<http://www.abc.net.au/ballarat/stories/s1260652.htm>

Rapke J, QC, "Seeking Justice and Seeking Convictions: Striking the Proper Prosecutorial Balance in High Profile Cases," Speech at the University of Melbourne, January 2008, available at:  
[http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eb78a9415660809/Seeking\\_Justice\\_and\\_Seeking\\_Convictions\\_Striking\\_the\\_ProperProsecutorial\\_Balance\\_in\\_High\\_Profile\\_Cases.pdf](http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eb78a9415660809/Seeking_Justice_and_Seeking_Convictions_Striking_the_ProperProsecutorial_Balance_in_High_Profile_Cases.pdf)

Richardson J, QC, "You can't see anything, but you can say what you like," Lecture delivered to the North Eastern Circuit, 6 October 2007, available at:  
<http://www.northeasterncircuit.co.uk/article.aspx?articleid=21>

Rozenes M, QC, "Prosecutorial Discretion in Australia Today," Speech delivered at the Australian Institute of Criminology Conference, Melbourne, 18-19 April 1996, available at:  
<http://www.aic.gov.au/events/aic%20upcoming%20events/1996/-/media/conferences/prosecuting/rozenes.ashx>